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Article

Comment

Note

Recent Development

Where allegations are made that the majority shareholders of a corporation have breached their fiduciary duty to deal fairly with the minority, through use of a Delaware short-form merger without any justifiable corporate purpose, a claim under rule 10b-5 exists. *Green v. Santa Fe Industries, Inc.*, 533 F.2d 1283 (2d Cir. 1976).

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The Indianapolis Experience: The Anatomy of a Desegregation Case*

WILLIAM E. MARSH**

I. BACKGROUND TO THE LITIGATION

A. *Brief History of Segregated Schools in Indianapolis*

The first opinion written by United States District Judge S. Hugh Dillin on desegregation[1] detailed a history of segregated public schools in Indianapolis. Prior to 1869, Indiana state law prohibited blacks from attending public schools,[2] and the Indianapolis Public Schools (IPS) enforced the state law.[3] Following the ratification of the fourteenth amendment to the United States Constitution in 1868, Indiana law was amended to permit blacks to attend public schools.[4] However, the Indiana Supreme Court held that the new law did not entitle black students to attend school unless a black public school was available in the district; the law did not entitle black students to attend the white (public) schools.[5] The policy of separate schools required by state law prevailed throughout Indiana until it was officially abolished by the Indiana General Assembly in 1949.[6]

In accord with the state law, IPS adopted a dual system of public education in 1869.[7] Therefore, until the state law was

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[1]United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

[2]The Supreme Court of Indiana held that a person was eligible for admission to public school only if he were between the ages of 5 and 21, unmarried; and neither a negro, a mulatto, nor the son of a mulatto. Draper v. Cambridge, 20 Ind. 268 (1863).

[3]332 F. Supp. at 664.

[4]Ch. 16, § 2, [1869] Ind. Acts 41 (repealed 1949).

[5]Cory v. Carter, 48 Ind. 327 (1874).

[6]Ch. 186, § 1, [1949] Ind. Acts 603 (repealed 1973).

[7]Indianapolis Public Schools implemented its dual system by building a new school house for the white students and assigning the black students to the old school building.

changed in 1949, segregated public education was the official policy in Indianapolis. Moreover, Judge Dillin found that the dual system was maintained in fact long after 1949 and after *Brown v. Board of Education*[8] in 1954.[9]

The dual school system was extended to the high school level in Indianapolis in 1927, when Crispus Attucks High School was opened as an all-black school. Prior to 1927, blacks attended their neighborhood high school, but in 1927 all black students were required to attend Crispus Attucks. Several forces were instrumental in the creation of this new school. In 1922, the Indianapolis Chamber of Commerce petitioned the school board to construct an all-black school, and that same year the school board passed a resolution creating the school.[10] Also, at least part of the black community supported the construction of Crispus Attucks because it created jobs for black teachers, who at that time were not permitted to teach in high schools.[11]

Busing was an issue identifiable with Crispus Attucks since its inception, but the issue debated in 1927 was not the same one that is controversial today. The issue then was whether IPS should provide transportation to black students being reassigned to Crispus Attucks from the high school nearest their homes. IPS resolved that there would be no busing. If black students wanted to attend high school, they not only had to attend Crispus Attucks but also had to provide their own transportation. Many Attucks students rode the street car to school, a journey which often required transfers and lasted up to 45 minutes each way.[12]

Until the 1930's the IPS Board of School Commissioners was elected in a partisan political election. For a time in the 1920's, the Republican Party was the dominant force in Indiana politics, and the Ku Klux Klan was a dominant force in the Republican Party.[13] To remove this "Ku Klux Klanism" of the school board, leaders of the Indianapolis community in 1929 obtained enactment of legislation removing partisan politics from school board elections and contemporaneously formed an elitist candidate slating com-

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[8]347 U.S. 483 (1954) [hereinafter cited as Brown I].

[9]"In short, nothing really changed during the 1954-1968 period, and the Indianapolis school system . . . remained segregated by operation of law." 332 F. Supp. at 670.

[10]*Id.* at 664.

[11]Thornbrough, *Segregation in Indiana During the Klan Era of the 1920's*, 47 MISS. VALLEY HIST. REV. 594, 601 (1961).

[12]Direct Exam of Alexander Moore, July 12, 1971. In 1971 Moore was IPS Assistant Sup't in charge of curriculum supervision. Record, vol. 1, at 150-51, 170.

[13]J. NIBLACK, THE LIFE AND TIMES OF A HOOSIER JUDGE 191 (1973) [hereinafter cited as NIBLACK].

mittee, the Citizens School Committee.[14] One of the founders of the committee, and the apparent leader for some 40 years thereafter, was John L. Niblack, the Republican Circuit Court Judge of Marion County, Indiana from 1947 until 1975.[15]

Since its formation, the Citizens School Committee has maintained nearly absolute control over the selection of members of the Board of School Commissioners. The Citizens School Committee's entire slate was elected to the board in every election from the formation of the committee in 1929 until 1964, when the first person from an opposition slate was elected.[16]

While it is clear that the Citizens School Committee has dominated the selection of school board members, there is no evidence that the school board itself, once elected, has been controlled or influenced by the committee. The stated philosophy of the committee is to select leading members of the community for election to the school board, to campaign for election of those people, and after their election to provide them complete independence in the operation of the schools.[17] This philosophy is prompted by the fact that members of the school board rarely serve more than one 4-year term.[18]

When the 1947 session of the Indiana General Assembly attempted to repeal the state law requiring segregated schools, the Board of School Commissioners ordered its superintendent to appear before the legislature and testify in opposition to the proposed legislation,[19] ostensibly because, in the judgment of the board, the legislation did not permit a phasing out of the dual school system but required an immediate elimination of segregated schools.[20] The 1947 bill failed to pass, but in 1949 the Indiana General Assembly enacted legislation which required desegregation of all Indiana's public schools.[21]

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[14] *Id.* at 331-32.

[15] *Id.* at 332.

[16] *Id.*

[17] *Id.*; confidential personal interview. [In preparing this study, the author interviewed many persons associated with the litigation, who asked not to be quoted. In order to differentiate information gleaned from these interviews from the author's own opinions such information will be cited to "confidential personal interview" where necessary.]

[18] In 1972 the Citizens School Committee merged, for purposes of slating candidates, with Citizens of Indianapolis for Quality Schools and slated a group of candidates as the Committee for Neighborhoods Schools (CNS). NIBLACK at 333. In 1976, three of the incumbent board members, each of whom had been slated by CNS in 1972, ran for reelection but without the support of CNS.

[19] 332 F. Supp. at 665.

[20] Confidential personal interview.

[21] Ch. 186, §§ 1-11, [1949] Ind. Acts 603 (repealed 1973).

In response to this legislation, IPS in 1953 reestablished the elementary school district boundaries.[22] At the 1971 school desegregation trial, IPS asserted that the 1953 boundaries were racially neutral and that the segregated schools which arose resulted from the boundaries selected following the segregated housing patterns in the city. Judge Dillin found that "[n]ot only did the Board not attempt to promote desegregation,"[23] but several aspects of the process of reestablishing the boundaries in 1953 would have been, if committed after *Brown I*, unlawful acts of de jure segregation.[24]

The 1953 plan provided optional attendance zones for the occasional integrated neighborhood.[25] Students in these neighborhoods could attend their choice of two schools, typically one black and one white. For whatever reason, these students almost always attended the school which was identified with their race.[26] The boundaries were based in part on a 1952 census of school children in which IPS, for no ascertainable reason, recorded the race of each child.[27] The 1953 boundaries were also partially based on the 1949 boundaries which were admittedly based on race.[28]. In some instances the lines drawn reflected residential segregation and ignored natural boundaries, requiring students to cross a canal, railroad track or arterial street to get to their assigned school where no such impediment stood between the student and an adjoining school.[29]

B. Prior School Desegregation Litigation

The plaintiff in *Cory v. Carter*,[30] a black parent of school-age children, resided in Lawrence Township in Marion County. The Lawrence Township school district did not have a black school and refused to accept the plaintiff's children as students at the white public school. The Indiana Supreme Court, in finding this action to be consistent with the Indiana and United States Constitutions,

[22]There have been a large number of minor changes since 1953, but the basic plan is still used in 1976. In 1971, Judge Dillin found that "[a]ccording to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90% of these promoted segregation." 332 F. Supp. at 670.

[23]*Id.* at 666.

[24]*Id.*

[25]*Id.*

[26]Direct exam of Alexander Moore, July 13, 1971. Record, vol. II, at 246.

[27]Direct exam of Paul I. Miller, July 13, 1971. Record, vol. II, at 314-15. Mr. Miller was IPS Ass't Sup't for elementary education in 1971.

[28]Redirect exam of Paul I. Miller, July 15, 1971. Record, vol. IV, at 778-79.

[29]332 F. Supp. at 666 & n.54.

[30]48 Ind. 327 (1874).

including the reconstruction amendments, held that the defendant's failure to provide a black school, as required by the 1869 state statute, did not entitle the black children to attend a white school.[31]

At the time IPS was preparing to construct Crispus Attucks High School, a lawsuit was commenced to stop construction of the school on the theory that a single all-black school could not possibly provide an educational program equal to that provided white students in the existing three specialized high schools, "technical, manual and classical and academic."[32] The Indiana Supreme Court refused to halt the project, saying that the lawsuit was premature: "When some colored child who is sufficiently advanced demands and is denied educational advantages accorded white children of equal advancement, then it will be time enough to take such proceedings as are necessary to secure the constitutional rights of such child."[33]

Mr. Arthur Boone, a black man, testified at the 1971 trial that he filed suit in 1952 to obtain a transfer of his children from School 64, the all-black school to which they were assigned to School 21,[34] which was 75 percent white.[35] The white school apparently was closer to his home, and his children had to cross railroad tracks to get to the black school. The only portion of the black school's district from which children had to cross the railroad tracks to get to school was a small pocket of three short streets where almost all of the residents were black. The suit was brought after a child was killed crossing the railroad tracks to get to school and after Mr. Boone had petitioned the school principal and the IPS central administration for a transfer of schools for his children.[36] Mr. Boone testified at the 1971 desegregation trial that when he filed his lawsuit there were only two white children on his block and that they both attended School 21.[37] The state court records do not reveal the outcome of the case, but Mr. Boone testified that his children always attended School 64, and that white children on his block always attended School 21.[38] Government counsel told the court they were unable to locate the records of the trial.[39] When

[31] *Id.* at 334-66.

[32] Greathouse v. Board of School Comm'rs, 198 Ind. 95, 99, 151 N.E. 411, 412 (1926).

[33] *Id.* at 107, 151 N.E. at 415.

[34] Direct exam of Arthur Boone, July 13, 1971. Record, vol. IV, at 790-96.

[35] Plaintiff's Exhibit 1, United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971).

[36] Direct exam of Arthur Boone, July 13, 1971. Record, vol. IV, at 792-93.

[37] *Id.* at 792.

[38] *Id.* at 794.

[39] Statement of Mr. John D. Leshy, July 16, 1971. Record, vol. V, at 967. The statement was made during the direct exam of Patrick Chavis, Jr., one

they attempted to offer evidence from Mr. Boone's lawyer, presumably to show that Mr. Boone's lawsuit was unsuccessful, the lawyer was not permitted to testify about the case because of the best evidence rule.[40] Defense counsel implied that a trial was held and that the court held against Mr. Boone.[41]

Two administrative agencies were interested in the racial composition of IPS prior to the filing of the lawsuit, but apparently neither had any significant impact. The Indiana Civil Rights Commission adopted a resolution in November of 1967 urging the Board of School Commissioners of the Indianapolis Public Schools to make an effort to obtain a more favorable racial balance in the schools.[42] The resolution specifically sought action regarding several overcrowded schools which had large black enrollments and which were in close proximity to all-white schools which had space available.[43] The Indianapolis Mayor's Commission on Human Rights publicly indicated a concern about the racial policies and composition of the IPS and apparently conducted an investigation.[44] Neither agency, however, took any action which had the force of law or which appears to have had any effect on the policies and practices of the school board.

C. Prelude to the Litigation

The Indianapolis Metropolitan Council of the National Association for the Advancement of Colored People (NAACP), acting principally through its president, Andrew W. Ramsey, was the moving force behind the Justice Department's initiation of the lawsuit. Ramsey, now deceased, was a past president of the Indiana NAACP and a school teacher at IPS Shortridge and Crispus Attucks High Schools. In 1968 he was president of a local of the American Federation of Teachers. Ramsey claimed credit for obtaining the formal complaint to the Justice Department from the parents of a black school child,[45] a technical requirement of the Civil Rights Act of 1964.[46] The complaining parent has never been publicly identified. In March of 1967, the NAACP publicly an-

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attorney for Mr. Boone in his 1952 action, in an attempt to get oral evidence of the hearing admitted over defense objection.

[40] *Id.* at 967-68.

[41] Cross exam of Mr. Patrick Chavis, July 16, 1971. Record, vol. V, at 969.

[42] Indianapolis Star, Nov. 17, 1967, at 23, col. 2 [hereinafter cited as Star].

[43] *Id.* Schools involved were 1, 66, 71, 73 & 86.

[44] Star, Aug. 23, 1968, at 32, col. 8.

[45] Indianapolis News, June 17, 1968, at 4, col. 2. [hereinafter cited as News].

[46] 42 U.S.C. § 2000c-6 (1970).

nounced its efforts to seek the Justice Department's intervention.[47]

The Justice Department conducted an investigation and concluded that IPS was guilty of unlawful segregation. In a letter to the IPS Board dated April 18, 1967, an Assistant Attorney General of the Civil Rights Division advised the board that suit would be filed unless corrective action was taken by May 6, 1968.[48] The president of the IPS Board of School Commissioners responded to the letter with a letter dated April 26, 1968,[49] denying the allegations of unlawful segregation and insisting that Indianapolis "has been in the forefront of progress in achieving equal treatment for all races in our schools."[50] The letter cited the official IPS policy adopted in a resolution on March 12, 1968: The policy commits the board to apparently conflicting objectives—neighborhood schools and integrated schools.[51] The letter emphasized the fact that

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[47]Star, Aug. 23, 1968, at 32, col. 8.

[48]Indianapolis Board of School Commissioners, Minutes, Book iii, at 2053 (1967-68) [hereinafter cited as Minutes]. *See also* Star, Apr. 27, 1968, at 25, col. 4.

[49]Minutes, Book iii, at 2058.

[50]*Id.* at 2059.

[51]

STATEMENT OF POLICY ON INTEGRATION
BY
THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS

The Board of School Commissioners is but one of many governmental and private agencies which may influence the opportunity and growth of Indianapolis and of each of its citizens. We look forward to a time when every religious, racial, and ethnic group in our city is integrated in a city which knows no formal or informal bars to the enjoyment of full opportunity and choice by every citizen. At present, housing restrictions, certain inequalities of job opportunity, legacies of history, unfounded prejudice, and considerable self-segregation by groups in our city stand in the way of an integrated, unified city. The Board of School Commissioners is not empowered nor is it capable of removing all of these barriers. The Board is privileged to affirm that it is willing to work with civil government, private agencies, and all men of good will to effect an integrated, unified society.

We believe in the concept of the neighborhood school, by which we mean a school district with boundaries based on factors of geography, available transportation, and broad social composition—a concept which would promote integration in the school system.

We believe that both certificated and non-certificated personnel must be employed on the basis of needs of the system and qualifications of the applicants. Our administration should examine employment practices frequently to make certain that they are fair. Our assignment practices should be examined frequently to make certain they foster integration.

the deadline which the Justice Department established for school board action was the day before the scheduled school board election and called the deadline very "unfortunate timing."[52] The board president was quoted by the newspaper as saying, "I certainly cannot say it was politically connected, but I do have to wonder."[53] In any event, racial integration was not a major issue in the 1968 school board campaign.

The only concrete action taken in response to the Justice Department's letter was a school board resolution on May 14, 1968, ordering the superintendent to submit a plan for voluntary integration of the faculties.[54] The resulting plan, which was reported to the board on May 23, 1968, called for each school principal to request voluntary transfers from teachers for the purpose of obtaining a racial mixture of the segregated faculties. The plan provided that a request for a transfer by a teacher pursuant to the plan would be viewed positively in future consideration for promotion in that it would indicate that the teacher desired to obtain a broader experience.[55] No other encouragement, consideration, or coercion was provided: the plan was largely unsuccessful.[56]

II. The Lawsuit

A. The Complaint

Pursuant to the Civil Rights Act of 1964,[57] the Department of Justice filed suit in the United States District Court for the Southern District of Indiana on May 31, 1968.[58] The named defendants were the Board of School Commissioners of the City of Indianapolis, Indiana; George F. Ostheimer, Superintendent of Schools; Mark W. Gray, President of the Board of School Commissioners; and the other six members of the Board of School Commissioners.[59]

> We believe that a high quality of educational environment should be provided for all students. In stating this aim, we affirm our intent to search for and to recognize obstacles to student progress and to provide a variety of approaches and services which are necessary to remove these obstacles.

Id. at 1453 (statement of policy issued 3-12-68).

[52]*Id.* at 2059.

[53]Star, Apr. 27, 1968, at 25, col. 4.

[54]Minutes, Book iii, at 2052.

[55]*Id.* at 2116.

[56]On August 5, 1968, IPS and the United States stipulated to a judgment for a plan to desegregate faculty and staff. As of August 18, 1968, volunteer transfers amounted to 15 percent of those needed to implement the plan. Star, Aug. 18, 1968, at 21, col. 1.

[57]42 U.S.C. § 2000c *et seq.* (1970).

[58]332 F. Supp. at 656.

[59]These other six members were: Mrs. John Alexander, Sammy Dotlich,

The complaint charged the defendants with unlawful racial discrimination by segregating students on the basis of race,[60] by assigning faculty and staff on the basis of race,[61] and by constructing and maintaining Crispus Attucks High School as a racially segregated school.[62]

The complaint alleged that "[t]he defendants have refused to take reasonable steps to correct the effects of its policies and practices of racial discrimination,"[63] and that as a result of these policies and practices, "the defendants have denied Negro students in the Indianapolis Public School System of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States."[64] The complaint stated that the Attorney General had received a complaint signed by a parent of minor negro children attending school in the Indianapolis Public Schools system and that the children were being denied equal protection of the law because of the dual school system.[65] The com-

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Marvin B. Lewallen, L. Robert Mottern, Mrs. Gertrude J. Page, and John C. Ruckelshaus.

[60]With respect to this charge, the complaint read as follows: "Assigning students, designing attendance zones for elementary schools, establishing feeder patterns to secondary schools, and constructing new schools on the basis of policies and practices which in some instances have the purpose and effect of segregating students on the basis of race." Complaint at 2, ¶ 9(a).

[61]With respect to this change, the complaint read as follows: "Assigning faculty and staff members among the various schools of the Indianapolis School System on a racially segregated basis so that as a general practice white faculty and staff members have been assigned on the basis of their race to schools attended only or almost entirely by white students and Negro faculty and staff members have been assigned on the basis of race to schools attended only or almost entirely by Negro students." Complaint at 3, ¶ 9(b).

[62]With respect to this charge, the complaint read as follows: "Pursuant to the policies and practices of racial discrimination described in the preceeding paragraphs, Crispus Attucks High School, which was built as an all-Negro school, has been maintained as a racially segregated school ever since, attended solely by Negro students and staffed almost entirely by Negro teachers, sixteen elementary and junior high schools are attended solely or predominantly by Negro students and staffed solely or predominantly by Negro teachers, and sixty-eight schools, both elementary schools and senior high schools, are attended solely or predominantly by white students and are staffed solely or predominantly by white teachers. There are 107 elementary schools, 5 junior high schools, and 11 senior high schools in the Indianapolis public school system." Complaint at 3, ¶ 10.

[63]Complaint at 3, ¶ 11.

[64]Complaint at 4, ¶ 12.

[65]Complaint at 4, ¶ 13. This allegation was supported by a separate document, a certificate of Ramsey Clark, the Attorney General of the United States, certifying that he had received the complaint as is required by statute. *See* 42 U.S.C. § 2000c-6(a)(1) (1970).

plaint asked the court to order the elimination of the alleged discriminatory practices.[66]

B. The Answer

The answer was filed on June 19, 1968,[67] and conceded that racial segregation at one time prevailed in the Indianapolis Public Schools but denied that any racial discrimination had occurred since 1949. The answer asserted that in 1968 "students are assigned, attendance zones designed, feeder patterns established, new schools constructed, and faculty and staff members assigned solely on the basis of sound nonracial educational principles and neighborhood considerations."[68] The answer affirmed that Crispus Attucks High School was built in 1927 as an all-negro school but alleged that the school has not been maintained as a racially segregated school for "many years."[69] The answer stated that the racial balance of teachers and students in each school generally reflected the racial composition of neighborhoods surrounding the school and that any racial imbalance resulted primarily from residential housing patterns or the private choice of the individual faculty members and students.[70]

The answer affirmatively alleged the following facts: The defendants had been operating a unitary school system for more than 20 years;[71] the unitary system was established prior to the 1949 Indiana legislation requiring desegregation of public schools and prior to the United States Supreme Court decision in *Brown I*;[72] the school district had taken affirmative steps to provide com-

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[66]

> WHEREFORE, the United States prays that this Court enter an order enjoining the defendants, their agents, officers, employees, successors, and all persons in active concert or participation with them for discriminating on the basis of race or color in the operation of the Indiana Public School System and from failing to adopt and implement a plan for the elimination of the aforementioned discriminatory practices in the Indianapolis Public School System in compliance with the Fourteenth Amendment to the United States Constitution.
>
> The United States further prays that this Court grant such additional relief as the needs of justice may require, including the costs and disbursements of this action.

Complaint at 4-5.

[67]United States District Court for the Southern District of Indiana, Cause Number IP 68-C-225. Answer.

[68]*Id.* at 1.

[69]*Id.* at 2.

[70]*Id.*

[71]*Id.*

[72]*Id.*

pensatory education on a nonracial basis for inner-city children and the program had benefited principally negro children;[73] to

> verify and maintain the defendant's objectivity in drawing attendance zones to implement the neighborhood school concept, the defendants are voluntarily seeking to employ impartial agencies outside the Indianapolis public school system to study the attendance zones;[74]

the school system had requested voluntary teacher transfers to achieve a wider distribution of faculty and staff of every race and that more than 100 applications for voluntary transfer for the upcoming 1968-69 school year had been received;[75] and "the defendants seek to afford every pupil in the public school system a superior educational opportunity completely without regard to race, color, or national origin."[76]

C. Early Defense Strategy

The general denial of racial segregation, albeit an appropriate pleading, did not candidly state the reaction of the defendants and their legal counsel to the complaint. The initial decision of defense strategy was to divide the controversy into three distinct categories: teachers, high school students, and elementary school students.[77] On the basis of this analysis, the school board apparently decided first to attempt to eliminate the racial identification of schools by faculty and staff, second to resolve the racial imbalance in the high schools, and last to *consider* the issues with respect to elementary schools.

The school board members and their lawyers believed their legal responsibilities and the practicalities of eliminating segregation as required by law dictated an individual consideration of each of these three aspects of the case.[78]

Almost all IPS schools in 1968 were racially identifiable by faculty. A stipulation between the parties, filed on August 5, 1968, shows that there were 18 schools in the IPS system with black principals. Of these 18 schools, 17 had at least 97 percent black students (14 had 99 percent or more black students and none of the 18 had less than 91 percent black students). Eleven of 18 schools with black principals had all black teachers, and in only 1 of the 18 were less than 92 percent of the teachers black.[79]

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[73] *Id.* at 2-3.
[74] *Id.* at 3.
[75] *Id.*
[76] *Id.*
[77] Confidential personal interviews.
[78] *Id.*
[79] Stipulation No. IX at 2 (filed Aug. 5, 1968).

The school board, on advice of counsel, concluded that the existing racial imbalance of teachers could not be defended legally.[80] In addition, the board members felt that as a political matter the assignment of teachers could be altered and the racial identification of schools by faculty eliminated much more easily than with respect to the student issues. The voluntary transfer plan had not resulted in enough voluntary transfers to eliminate the racial identification of schools and did not satisfy Justice Department attorneys. On July 14, 1968, the Justice Department filed a motion for a preliminary injunction as to the teacher assignments. This motion required the defendants to treat the assignment of teachers as a priority issue; it asked the court to order substantial reassignments before school opened in September of 1968.

The combination of the Government's pressure and the school board's view of the teacher portion of the law suit resulted in an out of court settlement with respect to teacher assignments. During the settlement process, Judge Dillin acted as a mediator through a series of pretrial conferences with counsel.[81] The IPS Board of Commissioners approved the settlement on July 30, 1968,[82] and its resolution was the basis for the stipulated judgment entered by the court on August 5, 1968. The judgment technically granted the Justice Department's motion for a preliminary injunction ordering reassignment of teachers. The plan required assignment of at least 83 white teachers to the 16 all-black schools and required all schools to have at least one black regular classroom teacher for the 1968-69 school year. The settlement still left the black schools with three to four times as many black teachers as white teachers.

D. The Teachers Become Involved

The teacher transfer plan was not favorably received by the teachers. One former board member told this writer that the board received little support from the teachers "to do the right thing."[83] In 1968 the teachers' organizations were not strong. There was no collective bargaining and the teachers' organizations were not active participants in the management of the school system. The Indianapolis Education Association [IEA], the leading but not exclusive teacher representative organization, was suffering the common academic identity problem of deciding

[80]Confidential personal interview.

[81]Confidential personal interviews.

[82]Resolution Number 5851-1968, Indianapolis Board of School Commissioners, Minutes, Book jjj at 257 (1968).

[83]Confidential personal interview.

whether it wanted to be a union or a professional association.[84] The dissatisfaction of many teachers with the teacher transfer program caused the organization to become more active and militant, and for the first time the leaders and members viewed the organization as a union.

The IEA apparently was not represented by counsel on a regular basis at the time the controversy arose in August of 1968. IEA specially retained an Indianapolis lawyer with labor relations experience as part of its response to the teacher transfer program. The attorney advised the IEA members that in order to be effective, *i.e.* to have any impact on the plan, they must view themselves as a union and be prepared to take strong measures, including litigation if necessary.[85] The IEA did take legal action in an effort to block the teacher transfer program. After an informal conference with Judge Dillin, IEA's counsel, concluding he could not successfully intervene in the pending school desegregation case,[86] filed a separate action in the Superior Court of Marion County, Indiana.[87] The complaint alleged that the teacher transfer program was a violation of the teachers' rights to due process of law.[88] The suit did not stop the teacher transfer program, but it did enable the IEA to take part in the formulation of the plan. The attorney engaged in lengthy negotiation sessions with representatives of IPS and their attorneys, and the IEA participated in the actual reassignment of teachers after the plan was approved.

One of the results of the negotiations was that the IEA and its attorney came to better understand the postion of IPS regarding the teacher transfers. Ultimately they decided to discontinue the active pursuit of the action in the Indiana state court.[89] At the conclusion of these sessions, counsel for the IEA felt that he had not been given a completely accurate understanding of the situation at the time the suit was filed and that perhaps his clients, the operating board of the IEA, had also not accurately understood the situation.[90] This suggests that more effective communi-

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[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] U.S. CONST. amend. XIV, § 1.

[89] If the lawsuit had ever reached the point where it posed a real threat of interfering with the teacher transfer plan it would surely have been transferred to federal court. In May 1969, John L. Niblack, Judge, Marion County Circuit Court, in a separate case brought by individual teachers, issued a temporary restraining order against mandatory teacher transfers for racial balance. This case was removed to United States District Court by IPS. Star, May 14, 1969, at 12, col. 4.

[90] Confidential personal interview.

cations between IPS and the teachers may have avoided the teachers' suit.

One of the side effects of the school desegregation case was to substantially strengthen the posture of the teachers as a group. The teachers came to view their organization as a union and themselves as union members, and they expected organizational leaders to take actions on their behalf which they previously would have felt were inconsistent with their concept of professionalism. In addition, the negotiation between the IEA Board and IPS Board established a precedent which undoubtedly played a role in the subsequent establishment of collective bargaining between the teachers, presently represented by IEA, and IPS.[91]

The resolution of the dispute between the teachers and IPS did not indicate that all of the teachers were willing to be reassigned. A sizable number of teachers left the IPS system rather than be transferred to a different school, and the school system experienced a teacher shortage when schools opened in the fall of 1968. The *Indianapolis Star* reported that at least 36 teachers who were scheduled to be transferred to new schools resigned rather than be transferred.[92] The article stated that at least 12 of these teachers found jobs in the Indianapolis suburban school districts. It was reported that school opened in the fall of 1968 with approximately 170 substitute teachers in the classroom compared to 70 in preceding years.[93]

The teacher transfer program also had an undesired and unexpected impact on the black schools. The plan contemplated that transferred teachers would be replaced by teachers of equal experi-

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[91]IEA again became an active participant in the desegregation process in 1974. On April 19, 1974, IEA petitioned to intervene as a party plaintiff. IP 68-C-225, United States District Court for the Southern District of Indiana. IEA sought to intervene to represent the interests of its members who were threatened with losing many jobs. In the summer of 1974, Judge Dillin had under consideration several proposed interdistrict remedies which contemplated transfer of a sizeable number of students out of IPS. IPS publicly announced its intention to terminate 1,000 teachers because of the decreased enrollment. Judge Dillin did not rule on the petition to intervene, effectively denying IEA an opportunity to participate. No interdistrict plan was implemented in 1974, and all threatened teachers were rehired. The court denied the motion to intervene on March 18, 1975, 11 months after it was filed.

When Judge Dillin ordered an interdistrict remedy on August 1, 1975, IEA renewed its motion to intervene. On August 8, 1975, Judge William E. Steckler, Chief Judge of the United States District Court for the Southern District of Indiana, acting in the absence of Judge Dillin, granted the IEA leave to intervene as a party plaintiff.

[92]Star, Sept. 4, 1968, at 23, col. 4; *see also* News, Sept. 5, 1968, at 27, col. 4.

[93]*Id.*

ence and level of competence. This part of the plan was frustrated by the numerous resignations of teachers scheduled to be transferred. The result, at least at Crispus Attucks High School (then an all-black school), was that experienced black teachers were transferred out of Crispus Attucks and replaced by inexperienced white teachers, because many experienced white teachers refused to be transferred to Attucks.[94]

It has been reported that the integration of a faculty did not go any further than reassigning teachers to previously racially identifiable schools. At Crispus Attucks High School, for example, the faculty did not become integrated in fact; rather the result was to create factions of teachers of different races in one building. At least in the early years of the transfer program, there was very little actual integration and interplay between the white teachers and the black teachers.[95]

The teacher controversy had one other side effect which has had a lasting impact on the school system. Active parent teacher association support of teachers scheduled for transfer from Northwest High School, a predominantly white school, evolved into an organization called Citizens of Indianapolis for Quality Schools, Inc. (CIQS), a conservative white organization. CIQS intervened in the case as a party defendant, aligning itself with the Indianapolis Public Schools,[96] because its members believed that IPS was not forceful enough in resisting the efforts of the Justice Department. After unsuccessfully running a slate of candidates in the 1968 school board election, CIQS merged with the previously dominant Citizens School Committee to slate a conservative anti-integration slate of candidates for the school board in the 1972 election. This slate was elected—the members of the slate, including one CIQS officer, are now the members of Indianapolis School Board and defendants in the school desegregation case.

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[94]Judge Niblack reports that "[t]he president of the student body of Crispus Attucks, our all colored High School which had brought fame to the city, a lad named Crenshaw appeared before the board [of school commissioners] to protest transfer of 38 Negro teachers of long standing out of Crispus Attucks, to be replaced by 38 white strangers." NIBLACK at 332.

[95]Confidential personal interview.

[96]CIQS moved to intervene on February 6, 1970. Judge Dillin denied the motion on April 29, 1971, more than 14 months after the motion was filed.

CIQS appealed to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit held that the district judge had not abused his discretion in denying intervention but that in light of subsequent developments, the court should reconsider the motion. United States v. Board of School Comm'rs, 466 F.2d 573 (7th Cir. 1972). On remand, Judge Dillin reconsidered the motion and on September 13, 1972, granted CIQS leave to intervene.

E. Attempts at Voluntary Desegregation

Following the resolution of the faculty imbalance aspect of the lawsuit, the IPS Board turned its attention to the high school phase of the case. IPS continued to consider the high schools and the elementary schools as two distinct problems. It approached the high school issue first because board members had less confidence in their legal position regarding the high schools and because the opposition to transportation of high school students was not as firm as the opposition to transportation of elementary students.[97]

After much deliberation the school board arrived at a proposal for desegregating the system's 11 high schools. The core of the plan was to close the two high schools located in predominantly black neighborhoods and desegregate the student bodies of the remaining high schools in the system by transporting the black students to those nine white high schools. The two high schools which would be closed were Crispus Attucks High School and Shortridge High School.[98]

Crispus Attucks High School had always been the black high school in the city. Even after changes in the law in 1949 and 1954, Attucks continued to attract black students from all over the city. For a time a freedom of choice plan was in effect which made Attucks an open school, permitting any student from anywhere in the city to attend Attucks. Many black students from outside the Attucks territory exercised their option to attend Attucks.[99]

The proposal to close Crispus Attucks was challenged vociferously by the black community. A coalition formed to oppose closing Attucks, Concerned Citizens for Crispus Attucks High School, brought together all segments of the black community, from Black Panthers to the most conservative members of the community. The coalition primarily petitioned the school board to retain the tradition of Crispus Attucks High School. The initial response of the school board was to proceed with its plan to close the existing Attucks facility but to preserve the Attucks heritage by building a new Attucks high school. The existing Attucks physical plant is over 40 years old and is located in a neighborhood that has been gutted of students by an interstate highway which passes the front door of the building.

This approach was not opposed by any significant segment in the black community, but the school board was unable to implement the plan. Several possible sites were selected for the new

[97]Confidential personal interviews.

[98]*Id.*

[99]*Id.*

high school. Plans for a new Crispus Attucks appeared near fruition when the IPS Board abruptly rejected the site under consideration.[100] This action came at the July 1970 meeting of the IPS Board, less than a month after a change in membership on the board.[101] Another site considered was an Indianapolis municipal tree-growing station, but the city refused to release the property for a new high school.[102]

The effort to construct a new Attucks collapsed when the final possible site became unavailable. Construction of a new high school at this site required a zoning change by the Marion County Metropolitan Development Commission. The commission rejected the zoning change after CIQS supporters appeared en masse at a hearing lobbying the commission to deny the IPS petition for a zoning change.[103] The IPS Board did not ask Judge Dillin to intercede in this zoning dispute. Judge Dillin subsequently questioned whether the Metropolitan Development Commission had the power to deny the zoning change where the effect of the denial was to interfere with the desegregation of the schools, and he suggested that IPS should have made the zoning dispute a part of the desegregation case.[104] Although the Metropolitan Development Commission was subsequently made a party to the case in federal court, the IPS Board did not ask the court to review the zoning change denial.[105]

The proposal to close Shortridge High School received similar opposition from a different segment of the community. Shortridge High School, the oldest high school in Indianapolis, is located in the north central part of the city, an area now predominantly black, but which historically was the home of the Indianapolis white establishment. Shortridge enjoys in Indiana an excellent reputation as an academic high school. Indiana citizens are proud of the fact Shortridge is the alma mater of many nationally prominent people, such as Kurt Vonnegut.[106] The opposition to

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[100] *Id.*

[101] The school board election was held in May 1968. Because of staggered terms, four persons elected in 1968 took office July 1, 1968, and the three remaining members elected in 1968, began their four-year terms on July 1, 1970. Sammy Dotlich was appointed to fill the unexpired term of Richard G. Lugar effective July 11, 1967. Dotlich was elected in May 1968, and his four-year term commenced July 1, 1968.

[102] 332 F. Supp. at 674.

[103] Confidential personal interview.

[104] 332 F. Supp. at 679-80. The Metropolitan Development Commission was subsequently made a party to the case. The issue which brought the commission into the case was whether past zoning practices would provide the basis for an interdistrict remedy.

[105] *Id.*

[106] Some of the same people are disgruntled by the fact Shortridge is the

the closing of Shortridge came from some of the most prominent and most powerful people in Indianapolis, including Mayor Richard G. Lugar.[107] Lugar, a graduate of Shortridge, was a member of the IPS Board from 1964 to 1967, when he was elected Mayor. During his tenure on the school board, he originated and attempted to effectuate the Shortridge Plan, a program designed to maintain an acceptable racial balance at Shortridge despite its loaction in an all-black neighborhood. The plan contemplated making Shortridge a magnet school[108] with an outstanding academic college preparation curriculum. The plan was unsuccessful partly because it existed more on paper than in the classroom. It was abandoned in 1968.[109]

As a consequence of the black opposition to the closing of Crispus Attucks, the white power structure opposition to the closing of Shortridge, and the CIQS opposition to a new Crispus Attucks, the school board gave up its efforts to voluntarily desegregate the schools. When the Metropolitan Development Commission denied the zoning change request for the new Crispus Attucks High School location, the board accepted the inevitability of a trial.[110] The efforts to devise a solution were replaced by a consensus among the board members that no plan to desegregate the schools could be implemented by the politically sensitive board without an order from the federal court.[111] There was some sentiment on the board that the board should not attempt to voluntarily desegregate the schools without a court order because the board had no method, other than a judicial decree, of assuring that a subsequent board would not reverse its efforts.[112]

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apparent model of Shortley High School in Dan Wakefield's novel *Going All the Way*. Wakefield is a Shortridge graduate.

[107]Confidential personal interview.

[108]Under the plan, Shortridge was not a complete magnet school. It was rather a combination of students from the neighborhood and students attracted from other neighborhoods. The reluctance of IPS to "go all the way" may have been fatal to the plan.

[109]Confidential personal interview.

[110]*Id.*

[111]The IPS board was politically sensitive because community groups had been successful in blocking contemplated board actions. In retrospect it seems surprising that the board was not more independent. Unlike some cities such as Boston, the school board in Indianapolis is not commonly used as a springboard to higher political office. Of the 13 different persons who served on the board between July 1967 and 1971, only one, Robert DeFrantz, has been a candidate for public office. DeFrantz was a candidate for reelection to the IPS Board in 1972 and is again a candidate in 1976. Richard G. Lugar, who left the IPS Board in 1967 to run for Mayor of Indianapolis and who in 1976 is a candidate for election to the United States Senate, is the only notable exception to the rule.

[112]Confidential personal interview.

Judge Dillin was patient while the school board attempted to desegregate the high schools. Following a December 1969 order that the case be expedited to trial, the IPS Board, on January 27, 1970, adopted the resolution which proposed desegregating the high schools by closing Shortridge and Attucks. In response to this resolution, Judge Dillin vacated the pretrial order expediting the trial, stating that developments had occurred which might lead to settlement of the case.[113] It was only after the board's efforts to desegregate the high schools had failed and the board gave up the attempt at voluntary desegregation that Judge Dillin proceeded with the trial.

Too many strong, inflexible segments in the community blocked the board's efforts. Some of those same forces, principally CIQS and similar groups, led the subsequent attacks on Judge Dillin. One of the most common grievances has been that Judge Dillin was too anxious to assume control over desegregation of the public schools. This criticism ignores the fact that he did not play an active role in the controversy until after the IPS Board concluded that it could not resolve the problem without outside intervention. Judge Dillin's granting of a continuance in January of 1970 demonstrates he was willing to let the school board develop its own solution and that he gave the board all the time it asked in order to develop a voluntary plan.

The board members' failure to voluntarily desegregate the high schools discouraged them from attempting to desegregate the elementary schools. They felt it was apparent that if they could not desegregate the high schools because of public pressure, they could not possibly desegregate the elementary schools.[114] The board never reached any concrete proposals, since the approach was to consider the elementary schools only after successfully dealing with the high school problem, which was never successfully resolved. It is unclear what were the actual sentiments of the board members in 1971 as to what should be done about the segregated elementary schools. The board might have tested the legality of racial composition in the elementary schools by defending the case even if it had been successful in desegregating the high schools. There had always been more opposition on the board with respect to busing elementary students than with the high schools.

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[113] *Id.*

[114] *Id.*

III. The Violation Trial—1971

A. The Government's Case

The issues raised by the Government's complaint as to the constitutionality of the racial balance of IPS students went to trial before Judge Dillin on July 12, 1971, more than three years after the complaint was filed. The early IPS strategy of separating the trial into three segments did not prevail at the trial. The teacher assignment issue had been resolved. The issues involving student assignments in the elementary schools and high schools were tried together.

The Government proved beyond doubt that prior to 1949 the Indianapolis Public Schools were segregated. The IPS system prior to 1949 was described as a typical southern, urban segregated school system;[115] the evidence demonstrating segregation by law prior to 1949 was not challenged or controverted by counsel for the defendants.

In 1949, when the Indiana General Assembly enacted legislation outlawing dual school systems, the official IPS policy was changed to conform with the state law.[116] In the critical post-1949 phase of the case, the Government offered evidence to prove that even following the change in official policy IPS did nothing, despite the requirements of the new state law, to eliminate the then existing dual system, but actually engaged in a pattern of actions designed to promote segregation and maintain a dual school system.[117]

The bulk of the Government's evidence was testimony and exhibits designed to demonstrate seemingly minor, individual actions of the IPS Board and administration which tended to promote segregation. The Government's strategy was to accumulate these actions to show a pattern of unlawful discrimination.[118]

This evidence of de jure segregation after 1949 included several categories of school board activity: construction of new schools and additions to existing schools, boundary changes for elementary school districts, high school feeder school patterns, optional attendance zones, alteration in grade structures, transportation policies and practices, and special education classes.[119]

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[115] *Id.*

[116] Thornbrough, *Segregation in Indiana During the Klan Era of the 1920's*, 47 Miss. Valley Hist. Rev. 594, 605-06 (1961).

[117] 332 F. Supp. at 665-70.

[118] Closing argument, John D. Leshy, July 21, 1971. Record, vol. VIII, at 1342-69.

[119] At the end of the trial Judge Dillin found that IPS actions in each of these categories had in fact promoted segregation in IPS. 332 F. Supp. 655.

The Government did not make a serious attempt to show purposeful racial discrimination, other than by inference, with respect to any of these actions. The evidence was instead designed to show that the cumulative effect of the school board actions was generally to promote segregation. In some instances, particularly boundary changes, government counsel suggested an inference of racial discrimination from the absence of any rational motivation for the decision other than racial separation.[120] In the post-1949 phase, there was no "smoking gun" in the Government's evidence but instead a large body of evidence, the cumulative effect of which, the Government suggested, showed a consistent pattern of racial segregation.[121]

The United States attempted to prove de jure segregation in the location of new schools. A stipulation entered in the record on August 5, 1968,[122] in connection with the settlement of the teacher issue, shows that from 1961 to 1968, 16 new IPS schools were constructed. Only one of these schools was significantly integrated on the day it opened. Fourteen of the 16 new schools opened with at least 99 percent white student population, one school opened with 820 black students and 20 white students, and another school opened with 997 white students and 318 black students.[123] The inferences drawn from these statistics were embellished by evidence that some of the new schools were built adjacent to schools attended primarily by students of the opposite race, thus inhibiting integration of the neighboring school districts.[124] The construction of two new high schools perpetuated segregation because the schools were located at the extreme northeastern and northwestern areas of the city where "the Board knew they would serve virtually all-white areas."[125]

At the time of the trial, the board was planning to build Forest Manor Middle School for grades six through eight. The school would open at the proposed location[126] with a student body approximately 90 percent black.[127] Judge Dillin cited this proposed school as evidence that IPS' actions perpetuating segregation were continuing up to the day the opinion was published, August

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[120] 332 F. Supp. at 663-72.

[121] *Id.*

[122] Stipulation No. XI (filed Aug. 5, 1968).

[123] *Id.*

[124] *See, e.g.*, Record, vol. IV, at 873-82.

[125] 332 F. Supp. at 669, n.65.

[126] 4501 E. 32nd St.

[127] 332 F. Supp. at 671.

18, 1971.[128] He ordered the school board to cease and desist from further planning of the school at the proposed location.[129]

Evidence was introduced at trial showing that the construction of new additions to existing schools had "more often than not . . . been used to promote segregation."[130] The court found that IPS had

> built additions at Negro schools and then zoned Negro students into them from predominantly white schools; it has built additions at white schools for white children attending Negro schools; it has generally failed to reduce overcrowding at schools of one race by assigning students to use newly built capacity at schools of the opposite race. The Board has also constructed simultaneous additions at contiguous predominantly white and Negro schools, and has installed portable classrooms at schools of one race with no adjustment of boundaries between it and neighboring schools of the opposite race.[131]

The evidence also showed that additions had been constructed to large black elementary schools where the board could have increased integration by adding classrooms to smaller, nearby white schools. The plaintiff offered evidence of these acts of de jure segregation from IPS records of construction projects and enrollment figures.[132]

The Government sought to prove that the use of optional attendance zones was part of a pattern of promoting segregation. Optional attendance zones for both elementary and high school assignments were utilized in various neighborhoods where the residential housing patterns were integrated. The optional attendance zone permitted students in the zone, a portion of a district, to attend one of two or more schools. Generally one school was white and one black. There was evidence that the students in the optional attendance zones customarily attended the school in which most of the students were of their race, even where this involved crossing actual barriers such as railroad tracks, arterial streets or rivers.[133]

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[128] *Id.*

[129] 332 F. Supp. at 681. Forest Manor School was ultimately built at 4501 E. 32nd Street, but the school opened with a more acceptable racial balance. The racial balance was adjusted by a court-approved alteration of the elementary school feeder patterns. The changes require busing some students.

[130] 332 F. Supp. at 667.

[131] *Id.*

[132] Gov't Exhibits 48 & 171.

[133] Record, vol. II, at 208-14, 244-46 (July 13, 1971); vol. IV, at 821-25 (July 15, 1971).

The Government presented evidence designed to show that IPS boundary changes had promoted segregation. IPS administrators testified that there had been approximately 350 changes in the boundaries of elementary school districts since the districts were established in 1953.[134] These changes were said to be necessitated by the rapidly expanding school population and were utilized to alleviate overcrowding in some schools. Although there was no direct evidence that any boundary changes were motivated by a desire to perpetuate segregation, Government counsel argued that an inference of racial motivation was established because there was no other rational explanation for some of the changes. The Government displayed numerous examples of unusually shaped districts, districts which ignored natural barriers, and districts drawn precisely between the black and white communities. Many of the changes followed an adjustment of the racial composition of a neighborhood. Judge Dillin found that "[a]ccording to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90 percent of these promoted desegregation."[135]

The racial composition of IPS high schools was scrutinized. The high school attended is determined by a feeder school system—all the students from an elementary school are assigned to a particular high school. Evidence was introduced to show IPS perpetuated segregation of the high schools by changing the feeder school assignments. As the racial composition of neighborhoods changed, the racial composition of elementary schools changed, sometimes with assistance from alteration of boundary lines.[136]

One method of alleviating overcrowding in some schools was to bus some of the students to another school. There was evidence to show that generally students were transferred to a school where most of the students were of their race, sometimes to the exclusion of closer schools with space available.[137] The Government suggested this practice had the effect of promoting segregation in the schools.[138]

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[134]Gov't Exhibit 27.

[135]332 F. Supp. at 670.

[136]Gov't Exhibit 88.

[137]Record, vol. IV, at 839 (July 15, 1971).

[138]The following persons were called to testify by the United States:

a. Virgil Stinebaugh, IPS Superintendent of Schools from 1944-1950; thereafter an IPS school principal until 1963. Record, vol. I, at 29-30.

b. Alexander Moore, IPS Assistant Superintendent in charge of curriculum supervision. *Id.* at 43.

c. Paul I. Miller, IPS Assistant Superintendent for elementary education. *Id.*, vol. II, at 270.

B. The IPS Defense

In its defense, IPS asserted that the districts for elementary schools were based on a neighborhood school concept and that the schools were de facto segregated because of housing patterns in the community rather than because of acts of segregation by the school board or the administration.[139] This de facto defense was coupled with the IPS position that any racial segregation which may have existed in the public schools of Indianapolis was in the past. IPS contended that practices of segregation had ceased prior to the trial and it no longer acted in any manner which could promote segregation. This defense was based on a proposition that the legal issue should be whether IPS was *presently* acting to promote segregation of the schools. The defendants conceded that the system had at one time been a dual school system but asserted that IPS had attempted to eliminate the dual system and was no longer acting in a manner which would promote a dual system.[140]

The IPS Superintendent of Schools and an assistant superintendent testified[141] that the board decisions, which the Government

d. George F. Ostheimer, IPS Superintendent of Schools from 1959 until March 1, 1969, when he retired. *Id.*, vol. IV, at 849.

e. Stanley C. Campbell, IPS Superintendent of Schools from 1969 to 1972. *Id.*, vol. V, at 946.

f. John Patterson, principal of IPS school 4 and a teacher in the IPS system since 1950. *Id.*, vol. IV, at 835-36.

g. Roscoe R. Polin, assistant principal IPS School 101; student at IPS Manual High School and Crispus Attucks High School from 1924-1928; and an IPS teacher since 1943. *Id.*, vol. IV, at 842-43.

h. Wilbur W. Barton, IPS industrial arts teacher from 1938-1968. *Id.*, vol. IV, at 820.

i. Arthur Boone. *Id.*, vol. IV, at 790-96.

j. Patrick E. Chavis, Jr., Boone's attorney. *Id.*, vol. V, at 966.

k. Grant W. Hawkins, first black member of the Indianapolis School Board. *Id.*, vol. IV, at 863.

l. William T. Ray, black realtor in Indianapolis for 25 years, and the first black member of the Indianapolis Real Estate Association in 1962. *Id.*, vol. V, at 911.

m. Theron A. Johnson, Director of the HEW team which drew up a proposed plan. *Id.*, vol. V, at 970.

[139]*See* note 51 *supra.*

[140]Closing Argument, G.R. Redding, July 21, 1971. Record, vol. VIII, at 1380-81.

[141]Defendants' witnesses were:

a. Stanley C. Campbell. *Id.*, vol. VI, at 1037.

b. Karl Kalp, IPS Associate Superintendent. *Id.*, vol. VI, at 1172.

c. William G. Mahan, IPS Assistant Superintendent for Personal Administration. *Id.*, vol. VII, at 1222.

d. Harry A. Radliffe, IPS Assistant Superintendent, Special Services. *Id.*, vol. VII, at 1251.

argued were evidence of segregation, were necessitated by a rapid growth in school population. All decisions, they said, were based on the neighborhood school concept, *i.e.* students should attend school in the neighborhood in which they reside without regard to its racial makeup.[142] As to decisions regarding the construction of new schools, identified by the government as de jure acts of segregation, the defendants argued that all the decisions were based on the neighborhood concept.[143] With respect to the Forest Manor Middle School, which the court found to be a continuing act of segregation right up to the time of its decision on August 18, 1971, the defense had claimed the school was needed in the black neighborhood in which it was proposed and that a failure to build a school in this neighborhood because of the race of the students would be an act of discrimination against the residents of the neighborhood.[144] The defense asserted that the proposed location was chosen on a racially neutral basis—the need for a school—and it was legally irrelevant that the school would be nearly all black when it opened.[145]

C. The Decision

1. General Conclusions

The trial concluded on July 21, 1971, and Judge Dillin announced his decision in a lengthy opinion on August 18, 1971.[146] Judge Dillin found that IPS was operating an unlawfully segregated school system on May 17, 1954 (the date of *Brown* I),[147] that IPS was continuing to operate an unlawfully segregated school system on May 31, 1968[148] (the date the complaint was filed against IPS), and that this unlawful segregation had not been

e. Joseph C. Payne, IPS Assistant to the Superintendent in charge of planning. *Id.*, vol. VII, at 1295.

f. Janet Hess, Research Statistician of the Community Service Counsel of Indianapolis. *Id.*, vol. VII, at 1267.

g. J. Hartt Walsh, Dean of the College of Education of Butler University and member of a committee of six who studied school boundaries in 1968. *Id.*, vol. VII, at 1278-79.

[142]Direct exam, Stanley Campbell, July 19, 1971. *Id.*, vol. VI, at 1037-1111; cross exam, Joseph Payne, July 20, 1971. *Id.*, vol. VII, at 1302-25.

[143]*See, e.g., Id.*, vol. II, at 371 (July 13, 1971); *id.*, vol. VII, at 1397 (July 21, 1971) (closing argument of G.R. Redding).

[144]Closing argument, Stephen Terry, July 21, 1971. Record, vol. VIII, at 1392-93.

[145]*Id.*

[146]332 F. Supp. 655.

[147]*Id.* at 677-78.

[148]*Id.*

eliminated as of the trial of the case.[149] Judge Dillin rejected the IPS theory that past practices were irrelevant and also rejected the factual justifications for the segregation presented by IPS.[150]

Having found the IPS system unlawfully segregated, Judge Dillin set the stage for the controversial remedy stage of the litigation with three of his conclusions of law:

> [T]he [IPS] Board is "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination (will) be eliminated root and branch."[151]
>
> All provisions of federal, state or local law requiring or permitting racial discrimination in public education must yield to the principle that such discrimination is unconstitutional; revisions of local laws and regulations and revision of school districts may be necessary to solve the problem.[152]
>
> This Court has continuing jurisdiction to make and enforce such decrees in equity as are necessary to accomplish the above mentioned objective. Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.[153]

These terse conclusions of law signal Judge Dillin's approach to the challenge of desegregating IPS. Judge Dillin had, in the early stages of the case, demonstrated an open animosity toward the efforts of the Justice Department and the Department of Health, Education, and Welfare to intervene in local school affairs.[154] From his opinion in the case, it appears the judge was persuaded beyond a doubt during the trial that the IPS system was unlawfully segregated and the court had a duty to eliminate the segregation.

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[149] *Id.*

[150] *See, e.g., id.* at 658.

[151] *Id.* at 678 (for this conclusion the opinion cites Brown v. Board of Educ., 349 U.S. 294 (1955) [hereinafter cited as Brown II]; and Green v. County School Bd., 391 U.S. 430 (1968)).

[152] *Id.*, citing Brown II.

[153] *Id.*, citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[154] Confidential personal interview.

2. Preparations for the Remedy Trial

In charting the course for formulation of a remedy, Judge Dillin was strongly influenced by evidence at the trial regarding what the court called the "tipping factor." Theron A. Johnson, Office of Education of the Department of Health, Education, and Welfare testified that when the percentage of black pupils in a given school reached approximately 40 percent, there was accelerated and irreversible white flight from the neighborhood in which the school was located.[155] Since IPS had, at the time the opinion was written in the fall of 1971, 37.4 percent black students, Judge Dillin concluded that a "massive 'fruit basket' scrambling of students" within IPS would in the long run not be an effective remedy because every school in the system would be near the tipping point.[156] The court's principal concern was that the resulting white flight would be so severe that the entire IPS system would become all black.

During the course of the trial, Judge Dillin repeatedly demanded, but never got, HEW statistics showing the resegregation effects of desegregation remedies in other cities. The judge expressed disbelief that such statistics were not available.[157] He apparently was influenced by the opinion in *Calhoun v. Cook*,[158] which indicated that as a consequence of desegregating Atlanta's schools, the Atlanta system had gone from 70 percent white students in 1961 to 70 percent black students in 1971.[159]

Sketchy as it may have been, the tipping point factor evidence was the most critical in terms of having the greatest impact, of all the evidence in the trial. Judge Dillin has not deviated from his reliance on the tipping point factor, but he has more explicitly recognized that there is no magic figure and that in some cases the 40 percent figure is too high.[160]

Though the phrase "interdistrict remedy" apparently had not been coined in 1971, in retrospect it seems clear Judge Dillin in his August 18, 1971, opinion was exploring possible legal theories on which an interdistrict remedy might be based. At the time the opinion was written, there were no answers nor even any

[155]Direct exam, Theron Johnson, July 16, 1971. Record, vol. V, at 995-96; Gov't Exhibit 178 at 14.

[156]332 F. Supp. at 678-79.

[157]*See, e.g.*, questions by the court to Theron A. Johnson, July 16 and 20, 1971. Record, vol. V, at 1019-23; *Id.*, vol. VII, at 1337.

[158]332 F. Supp. 804 (N.D. Ga. 1971).

[159]*Id.* at 805.

[160]*See, e.g.*, United States v. Board of School Comm'rs, 368 F. Supp. 1191, 1197 (S.D. Ind. 1973).

suggestions from the appellate courts with respect to the legality of interdistrict remedies. Judge Dillin was on the cutting edge of a developing area of law with no guidance from higher courts or the parties in the case. The Justice Department had not taken a position regarding the appropriate remedy and had not introduced evidence at the 1971 trial which was designed to bear on the remedy issue.

Judge Dillin directed the future course of the litigation by raising questions about situations in which the law will permit or will require an interdistrict remedy.[161] The questions posed by the judge suggested several theories which would subsequently be litigated. First, does the creation by the Indiana General Assembly in 1969 of the consolidated city-county government for Marion County (Uni-Gov), without similar extension of the territory of IPS, constitute legal grounds for an interdistrict remedy?[162] Second, does the failure of the State of Indiana, including the General Assembly, to provide for a metropolitan school district embracing all of Marion County constitute unlawful segregation by the state?[163] The theory that it does is based on the proposition that the state has an affirmative duty to eliminate the de jure segregation in the IPS. Finally, do the actions of the Metropolitan Development Commission of Marion County contribute to unlawful segregation by placement of low income housing projects?[164]

The only additional basis, not suggested in this opinion, on which an interdistrict remedy has been considered concerns restrictive zoning practices by suburban communities. If shown to contribute to residential segregation, such practices might justify an interdistrict remedy. This is the theory of relief suggested by Mr. Justice Stewart in *Milliken v. Bradley*.[165]

Judge Dillin ordered further proceedings to consider the remedy issue.[166] He also ordered that three groups of new defendants be brought into the case.[167] First, the judge ordered the Justice Department lawyers to "prepare and file appropriate pleadings to secure the joinder herein as parties defendant of the necessary municipal corporations and school corporations which

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[161]332 F. Supp. at 679. Judge Dillin's critics contend these questions demonstrate the judge was committed, at least as early as 1971, to a metropolitan desegregation plan and was, in subsequent proceedings, searching for a theory upon which to justify such a plan.

[162]332 F. Supp. at 679.

[163]*Id.*

[164]*Id.*

[165]428 U.S. 717 (1974).

[166]332 F. Supp. at 678-79.

[167]*Id.* at 679-80.

would have an interest" in the consideration of an interdistrict remedy.[168] Second, he ordered IPS to "proceed similarly as to those agencies which would appear to have an interest" in the theories based upon allegations of unlawful actions by government subdivisions other than the school corporations.[169] Finally, the judge ordered the Justice Department to serve process on the Indiana Attorney General "[b]ecause of the interest of the State of Indiana in the constitutionality of its law . . . ."[170] Judge Dillin emphasized that the suggested theories were not exhaustive and seemed to solicit additional input and invite others to seek intervention.

3. Intermediate Remedial Orders

While establishing the process by which the final remedy would be ascertained, Judge Dillin ordered IPS to make several changes designed to stabilize the racial balance in the IPS schools and to prevent further segregation during the formulation of the final remedy. IPS was ordered to immediately assign faculty and staff so that no school could be racially identified by its faculty or staff.[171] This portion of the order was unanticipated since the faculty and staff segment of the case had been resolved by a consent judgment before the trial. Judge Dillin apparently made this order because of the evidence that experienced black faculty members were being reassigned to white schools and were being replaced in the black schools by less experienced white faculty members. IPS was ordered to redress the situation.[172] When school opened less than a month later on September 7, 1971, 132 teachers were reassigned after another bitter dispute between IPS and teachers.[173]

IPS was ordered to "[i]mmediately continue with their plans to desegregate and relocate Crispus Attucks High School."[174] White students attended the historically all-black Crispus Attucks for the first time in the fall of 1971, when 900 white 9th and 10th grade students were assigned there.[175]

No serious effort to relocate Crispus Attucks was made after 1971. The IPS Board had earlier made a diligent though unsuc-

[168] *Id.*

[169] *Id.* at 680.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] News, Sept. 7, 1971, at 1, col. 4.

[174] 332 F. Supp. at 680.

[175] Blacks in Indianapolis won't soon forget that as soon as Judge Dillin ordered Crispus Attucks integrated, IPS spent $250,000 to improve the physical structure. Confidential personal interview.

cessful effort to relocate Attucks, but its efforts were thwarted by public opposition and it had no desire to undertake the battle again. On January 11, 1972, the IPS Board resolved to abandon its plans to construct a new building to replace Attucks, and Judge Dillin approved this action. IPS attributed its decision to projections showing a declining enrollment.[176]

Judge Dillin ordered IPS to alter its "majority-to-minority transfer" policy to encourage voluntary integration.[177] This voluntariness was to be promoted by providing transportation to students making such transfers, eliminating a requirement that such transfers would be dependent upon availability of space, and publicizing the transfer option to eligible students and their parents.[178] These changes were made by IPS, but the transfer policy had no noticeable impact on the racial composition of the schools.

The court ordered IPS to attempt to negotiate with suburban school corporations for possible transfer of minority race students to the suburban school for the upcoming school year.[179] IPS promptly initiated contact with the other Marion County public school corporations and the two non-Marion County schools mentioned in the opinion, Carmel-Clay and Greenwood. After preliminary discussions IPS formally proposed that each school corporation accept from Indianapolis black students equal to from 2 to 5 percent of their total enrollment.[180] Judge Dillin never ruled upon the acceptability of this token transfer, but it is believed that he would have approved if all suburban schools had agreed to accept 5 percent minority students. In a statement to the news media on September 8, 1971, Judge Dillin implored the suburban schools to voluntarily accept the black students saying the suburban school corporations would be "brought to trial" unless a voluntary plan were reached.[181] Judge Dillin did not say how many students would have to be transferred to make the plan agreeable to him, but the *Indianapolis Star* reported, "it is believed" an agreement to accept close to 5 percent black students would be acceptable to the Judge.[182] At a pretrial conference in December 1971, Judge Dillin commented that he would "probably approve 5 percent."[183]

On September 13, 1971, the school board of the Metropolitan School District of Lawrence Township held a public meeting to consider the IPS proposal. More than 1,000 persons, mostly par-

[176]Star, Jan. 12, 1972, at 25, col. 3.

[177]332 F. Supp. at 680.

[178]*Id.*

[179]*Id.*

[180]News, Aug. 28, 1971, at 3, col. 1.

[181]Star, Sept. 8, 1971, at 1, col. 4.

[182]*Id.*

[183]Star, Dec. 21, 1971, at 1, col. 3.

ents, attended the meeting to show their support of the school board's position against the transfer of children to the township schools.[184] Not surprisingly the Lawrence board voted to reject the IPS proposal. Eventually all of the other surburban school corporations rejected the IPS proposal.[185]

This order was the first indication of the court's inclination toward a remedy which would desegregate the inner-city black schools by one-way transportation of the black students to the white suburban schools with no reciprocal transportation of white students to black schools in the city. This controversial approach is found in each subsequent major decision of Judge Dillin relating to specific plans for desegregation.[186]

Judge Dillin ordered that IPS immediately cease and desist from the planned construction of the Forest Manor Middle School until the court could hear further evidence on the subject.[187] Less than a month after the decision Judge Dillin set aside this portion of the order. The Forest Manor Middle School was constructed at the original planned site in an all-black neighborhood, but when it opened students were assigned to it from a much broader area.

4. Tipping Point Schools

Judge Dillin ordered IPS to resurvey the racial composition of all schools for the upcoming 1971-72 school year and "take appropriate action to prevent schools, including high schools, now having a reasonable white-black ratio from reaching the tipping point."[188] This ruling contained the first court-ordered forced busing in Indianapolis. It required the transportation of students as necessary to prevent any school from reaching the tipping point. Judge Dillin also gave notice of his position regarding the busing controversy. In a footnote, he said, "This Court regards the outcry made in some quarters against 'bussing' as ridiculous, in this

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[184]News, Sept. 14, 1971, at 12, col. 1.

[185]During the course of the subsequent litigation, some attorneys for suburban schools persuaded their clients to voluntarily accept black students from IPS. Those attorneys told this writer Judge Dillin would not approve such settlements unless all suburban schools were included. The hard line resistance in some suburban areas made this a virtual impossibility.

One highly respected attorney told this writer he was nearly fired for pushing his school board to voluntarily settle the case.

[186]The opponents of one-way busing have had little impact in the case. Perhaps there is no way they could have had more impact, but the chances of their having a greater impact may have been increased if Judge Dillin's commitment to one-way busing had been more clearly recognized at this early date.

[187]332 F. Supp. at 681.

[188]*Id.*

age of the automobile. Most students in the outside school corporations have been bussed for years, with never a complaint about bussing per se."[189]

In response to this last order, IPS identified several elementary schools as being near the tipping point of 40 percent black and likely to go beyond the tipping point if not adjusted. Less than 1,000 elementary students were reassigned for the 1971-72 school year. Some of these students were bused to a new school beginning in September of 1971.[190]

These tipping point schools were subsequently included in the interim plan. Now, however, all of these schools are well beyond the 40 percent black student tipping point.[191] It is clear from these statistics that IPS, while it may have complied with the letter, certainly did not comply with the spirit of the order. Judge Dillin plainly intended that the schools be kept below the tipping point not just for one school year but until the formulation of the final remedy. In analyzing the court's failure to enforce the order, it is important to recognize that these four schools were only a minor portion of a complex case. It probably should not be anticipated that the court will strictly enforce such orders unless there are parties to the action or citizens in the affected schools who are willing to scrutinize compliance with the court's orders and pursue violations. This was apparently not done in the present case and may be an example of a need for a court-appointed committee to monitor compliance with the orders.

The tipping point order resulted in the reassignment of less than 1 percent of the IPS students.[192] This is not a very significant change statistically, but this writer believes the order was an important one. One of the conclusions of this Article is that passage of time has resulted in increasing acceptance of court-ordered integration. Without the tipping point order in 1971, no students would have been reassigned or bused until 1973, and the realities of school desegregation would not have become apparent to the people of Indianapolis for two more years. Although

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[189]*Id.* n.100.

[190]In an interview with this writer an IPS administrator said 144 white students and 251 black students were bused to a new school in 1971 pursuant to this order.

[191]Four of the tipping point schools were schools 11, 53, 70 and 83. In December, 1974, School 11 was 64 percent black, School 70 was 49.5 percent black and School 83 was 87.5 percent black. Enrollments, 1973-1974 and 1974-1975 source and comparison, high schools (9-12), elementary schools (K-8) Indianapolis Public Schools, December, 1974. Filed in Federal Court, Cause No. IP 68-C-225 by attorneys for IPS on December 23, 1974.

[192]*See* note 190 *supra*.

it was only a token, the token was important because it meant school desegregation in Indianapolis actually began in 1971.

D. Community Response to the Decision

Political leaders in Indianapolis responded promptly to the decision. With the notable exception of Stanley Campbell, the IPS Superintendent of Schools, all responded adversely.

The court's opinion was announced approximately ten weeks before the Indianapolis mayoral election. Since the opinion raised doubts about the legality of Uni-Gov and its effect on the school system, the school desegregation case immediately became a campaign issue.[193] The fact that Richard G. Lugar, Mayor and Republican candidate for reelection, had been a member of the IPS Board from 1964 to 1967 added fuel to the political controversy. Both candidates for mayor responded quickly and negatively to the decision. Though both candidates stated several times the school desegregation case was a bonus issue in the mayoral campaign, because the mayor had no legal power regarding the schools, both candidates continued to emphasize their own opposition to forced integration of schools.

Democratic candidate John F. Neff was widely accused of running a racist campaign. The allegations were based in large part on his vocal opposition to Judge Dillin's opinion. William M. Schreiber, Marion County Democratic Chairman and candidate for the 1975 Democratic nomination for mayor said,

> [t]he 1971 mayoralty election saw the Democratic candidate [Neff] make a desperate anti-busing appeal to the suburban 'doughnut' that surrounded the 'old city.' That appeal was an effect of consolidation [Uni-Gov] : it would never have been made otherwise.[194]

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[193]Democrats in Marion County have always been opposed to Uni-Gov. A large portion of the voters brought into the city are Republicans. The Democrats' opposition to Uni-Gov did not end with the consolidation of the city and county governments by the Indiana General Assembly. Marion County Democrats are still trying to dismantle Uni-Gov. In evaluating the public response, one should note that the Indianapolis newspapers, the *Star* and the *News*, have consistently been sharp critics of Judge Dillin's actions in the case. Some people in Indianapolis believe the newspapers have contributed to the adverse public reaction. Judge Dillin's supporters believe the Indianapolis newspapers have unfairly reported the case and have withheld coverage of the school desegration case in Louisville, Ky., a case with many similarities to the Indianapolis case. In contrast, the *Louisville Courier-Journal* has comprehensively reported the Indianapolis case.

During a proceeding in open court on August 20, 1973, Judge Dillin described an editorial in the *Indianapolis News* as asinine. Record at 237.

[194]W. Schreiber, Indianapolis-Marion County Consolidation, How Did It All Happen? 33 (Indiana University Masters Thesis).

Shortly after the opinion was handed down Mayor Lugar announced his opposition to a metropolitan desegregation plan. Lugar spoke against "forced busing" to obtain racial balance and also stated that he was opposed to the concept of a metropolitan school district, one school district encompassing all of Marion County. His opposition was based on the size of the resulting district.[195] Lugar was quoted in 1971 as saying that he felt IPS was too large. He opposed a new Crispus Attucks on the ground that it was not needed, and opposed integration of the existing Attucks on the grounds that it was "several years late." Lugar cited a "new spirit" in the black community as evidenced by the building of a new community-owned supermarket, Our Market, which was built on the site of a neighborhood market which had been burned during racial violence in 1969.[196] Apparently the Mayor meant by this that in his judgment the black community wished to keep Crispus Attucks as an all-black high school, or at least as a high school which was not artificially integrated.[197] Regarding the Uni-Gov issue and the court's suggestion that Uni-Gov might be the source of an interdistrict remedy, the Mayor said that "Uni-Gov is a red herring dragged across the path."[198]

The Mayor's Democratic opponent, John F. Neff, tried very hard to sound as if he were more opposed to Judge Dillin's decision than the Mayor. He attempted to connect the Mayor directly with the decision. Neff indirectly charged Lugar with responsibility for the decision. Because Lugar was Mayor and a former member of the IPS Board, he was partially responsible for the segregated schools and the segregated schools were the reason for the decision. Neff, a lawyer, was not content to simply use the decision as a campaign issue. On August 23, 1971, five days after Judge Dillin's decision, Neff, along with two of his associates, filed a petition to intervene as parties to the IPS desegregation case. Neff's stated reasons for seeking intervention were to "challenge the constitutionally of Uni-Gov" and to "have the court order a referendum on Uni-Gov" for the November ballot.[199]

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[195]Star, Aug. 20, 1971, at 1, col. 5. Bill Schreiber reports that in 1966 Lugar, as a member of the Indianapolis Progress Committee "proposed that the eleven school districts of Indianapolis and Marion County be consolidated." Schreiber says that "[p]ublic reaction was so overwhelmingly negative and hostile that Lugar withdrew his proposal, having learned at minimal expense the depth of sentiment in metropolitan Indianapolis for the status quo." Schreiber, *supra* note 194, at 2.

[196]Star, Aug. 20, 1971, at 1, col. 5.

[197]Four years later, as part of the interim desegregation plan, two of the mayor's sons attended Crispus Attucks High School.

[198]Star, Aug. 20, 1971, at 1, col. 5.

[199]Confidential personal interview.

Neff's prayer for a ruling on the constitutionality of Uni-Gov came despite the fact that the Indiana Supreme Court had held Uni-Gov to be constitutional.[200]

Judge Dillin promptly and firmly responded to Neff's attempt to involve the court in the mayoral campaign. He denied Neff's petition on September 1, 1971, commenting that the petition raised "sham issues put forward in the interest of political opportunism."[201] Judge Dillin's sharp rebuff of candidate Neff may have been prompted by charges that his decision was politically motivated. The day after the decision was announced, L. Keith Bulen, Marion County Republic Chairman and a lawyer, was quoted by the *Indianapolis Star* as saying that

> "the former Democratic State Senate leader, now Federal judge, has a fine political as well as legal mind. . . .
>
> We will study immediately and carefully his dictum and findings in order to evaluate more fully his talents in both arenas, as we coincidentally approach the last two months before our city elections."[202]

The only public support for the decision came from the Indianapolis Chapter of the NAACP and the Indianapolis Urban League. The Rev. John P. Craine, Bishop of the Episcopal Diocese of Indianapolis and president of the Indianapolis Urban League, hailed the decision as a " 'landmark for all cities, since it talks of the inclusiveness of a metropolitan area in all our planning and working.' "[203] The most vocal supporter of Judge Dillin's decision was Stanley Campbell, the IPS Superintendent of Schools. The day after the decision was announced Campbell was quoted as saying "I have a great deal of confidence in his [Dillin's] thinking . . . ."[204] Campbell added that he had doubts whether a metropolitan school system would solve segregation problems in Indianapolis or elsewhere but said that the school officials could live with the decision.[205] On September 1, 1971, Campbell told an Indianapolis Rotary Club meeting the following:

> I have some criticisms, but I was tremendously impressed with the way he got to the heart of the problem

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[200]Dortch v. Lugar, 255 Ind. 545, 266 N.E.2d 25 (1971).

[201]Star, Sept. 1, 1971, at 1, col. 3.

[202]Star, Aug. 20, 1971, at 1, col. 5. Other adverse reactions included a comment from Theodore L. Sendak, Indiana Attorney General, who called the decision to bus school children to achieve racial balance a " 'kind of Hitlerism on wheels.' " Star, Sept. 2, 1971, at 38, col. 1.

[203]Star, Aug. 20, 1971, at 1, col. 5.

[204]Star, Aug. 19, 1971, at 11, col. 5.

[205]*Id.*

> and particularly its long range implications. I personally have thought this is a great challenge for the community. The community, Dillin's ruling indicates, has a guilty conscience and the school system has been the focus of segregated practices. . . .
>
> As superintendent I feel the decision was reasonable and has pointed us toward improved educational practices.[206]

Statements like this caused Campbell to be a major issue in the 1972 school board election and resulted in his immediate firing when his detractors were elected.

At an IPS Board meeting on August 31, 1971, the board voted four to three to appeal Judge Dillin's August 18, 1971, decision to the United States Court of Appeals for the Seventh Circuit. In light of the long list of essentially uncontroverted acts of unlawful segregation recited in the opinion and the fact that the opinion was not a final judgment,[207] the vote to appeal came as a surprise to many. The decision to appeal was not, however, a demonstration of the board's continuing, inflexible belief in the legal positions they took at trial. The three black members of the board voted against an appeal.[208]

Some board members believed that any procedure which might possibly obtain a reversal of the court's order should be attempted and for this reason favored an appeal. There was some sentiment on the board that the community was entitled to an appellate review of this important decision as a matter of course without regard to the feelings of individual board members regarding the merits of the case. The decisive votes were cast by two Indianapolis lawyers. These two board members were quoted as saying that the appeal was "more 'to keep the options of the board open' in the event of further rulings by Dillin than to block what has already been decreed."[209]

Also discussed at this meeting was the public criticism, fueled by a newspaper editorial, that the board's position had not been vigorously enough asserted by counsel for the defndants. The two lawyer board members strongly defended the conduct of the litigation by defense counsel[210] and their vote to appeal, which was

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[206]Star, Sept. 1, 1971, at 10, col. 3.

[207]There was not a final judgment because a remedy had not been ordered.

[208]News, Sept. 1, 1971, at 1, col. 7. The three members voting no were Landrum E. Shields, Jessie Jacobs and Robert DeFrantz. The first two objected on procedural grounds.

[209]News, Sept. 1, 1971, at 1, col. 7.

[210]*Id.*

taken at the same meeting, has been interpreted by some to be in part based on a desire to alleviate this criticism.

The appeal in fact turned out to be extremely important in that the affirmation of Judge Dillin's decision by the Seventh Circuit on February 1, 1973,[211] and the denial of certiorari by the United States Supreme Court,[212] served to alleviate some of the personal criticism of Judge Dillin. The affirmation of the decision on appeal did not silence all critics, but it had a significant impact on the public opinion of more moderate elements of the community. The attention of some hard core critics was diverted from Judge Dillin as an individual to the federal judiciary or to the federal government as a whole. In retrospect, it is clear that the appeal was a definite asset to the court in that it provided Judge Dillin a great deal of credibility that he did not previously enjoy.

Immediately after voting to appeal the court's decision, the IPS Board defeated a motion to request a stay of the court's orders. This action followed advice from the attorneys for the board that a motion for a stay would be a "waste of time because they are so rarely granted."[213]

IV. The Search for a Remedy

On September 7, 1971, the United States, acting pursuant to Judge Dillin's order of August 18, 1971, filed a motion to add parties defendant to the case.[214] Judge Dillin granted the motion the same day. The judge had not ordered the joinder of specific party defendants, thus leaving some discretion to the Government as to which schools in the metropolitan Indianapolis area should be joined. The school corporations added by this motion can be placed in two categories. Eight of the added defendants are the school corporations of the eight townships in Marion County not entirely served by IPS.[215] Two of the new defendants are school corporations which are associated with towns in Marion County.[216]

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[211] United States v. Board of School Comm'rs., 474 F.2d 81 (7th Cir. 1973).

[212] 413 U.S. 920 (1973).

[213] Confidential personal interview.

[214] 368 F. Supp. at 1195.

[215] *Id.* at 1195-96. These school corporations serve the suburban Marion County portion of metropolitan Indianapolis. The school corporations in this group are the Metropolitan School Districts of Pike, Washington, Lawrence, Warren, Perry, Decatur, and Wayne Townships, and Franklin Township Community School Corporation.

[216] *Id.* at 1196. The two municipal school districts are the Beech Grove City School and the School Town of Speedway. These towns are both in suburban Marion County.

One week later, on September 14, 1968, nine more school corporations from outside Marion County were joined as defendants by the complaint of the intervening plaintiffs, Donny and Alycia Buckley.[217] Two years later, upon the motion of the intervening plaintiffs Buckley, the court added another group of defendants, all school corporations outside Marion County.[218]

The method the Justice Department chose to bring in the additional parties is significant. The United States did not file a complaint or any other pleading against the added defendants.[219] The United States did not charge these schools with acts of de jure segregation and did not ask for any relief against them. The Government's ambivalence in this action set the tone for its posture during the remedy portion of the litigation. During the preparation and trial of *Indianapolis I*, the Justice Department firmly pursued the objectives established in the complaint and presented the case as a dedicated advocate. Once the court found IPS to be unlawfully segregated, the Government seemed to lose its purpose or its conviction; and for the next four years at least, the Justice Department performed a much different role.

The difference may be that when the complaint was filed in 1968, the Government was committed to acquiring a judicial resolution of whether IPS was unlawfully segregated. Once the decision was reached, that commitment was satisfied. The Government has not to date taken a firm position on what the remedy should be. This lack of decisiveness was a burden in the case at times but it is understandable. From 1971 to 1975 was a period of development of remedies for desegregating schools. The appropriate role of the Justice Department may be different in developing the law than in enforcing the law.

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[217] *Id.* The schools in this group of added defendants are the Mt. Vernon Community School Corp. and the Greenfield Community School Corp. from Hancock County; Mooresville Consolidated School Corp. from Morgan County; Plainfield Community School Corp., Avon Community School Corp., and Brownsburg Community School Corp. from Hendricks County; Eagle-Union Community School Corp. from Boone County; Carmel-Clay Schools from Hamilton County; and Greenwood Community School Corp. from Johnson County. The Buckley children and their mother intervened as representatives of the class consisting of all black school children within IPS. The intervention of the Buckleys was sponsored by the NAACP.

[218] Schools in this group are the Center Grove Community School Corp. and Clarke-Pleasant Community School Corp., Johnson County; Southern Hancock County Community School Corp., Hancock County; Hamilton Southeastern Schools, Hamilton County; and Northwestern Consolidated School District, Shelby County. Request for Service of Process as a Poor Person at Government Expense. Filed 9/12/73 and granted 9/13/73 by Judge Dillin.

[219] 368 F. Supp. at 1195.

The role of the Justice Department in the remedy portion of the Indianapolis school desegregation case is an extremely complex matter, and is clearly oversimplified here; but there are many apparent reasons for the Government's lack of direction. There were seven different philosophies on school desegregation, all of them different from the philosophy of Ramsey Clark, the Attorney General between 1968 and 1975. The remedy issue in desegregation cases has been one of the most emotional issues the country has known and was a highly visible issue in the 1972 presidential election campaign. The Nixon-Agnew administration strongly opposed busing. In addition the attention of the Justice Department was for a portion of this period diverted to Watergate matters, and likely the "Saturday night massacre"[220] did not encourage people in the Justice Department to take firm, unpopular positions.

The added school corporations for the most part responded independently to their joinder. A prominent Indianapolis lawyer represented two of the township schools, Wayne and Lawrence, and his partner represented Warren Township. A law professor with extensive trial experience represented five of the school corporations from outside Marion County. The remainder of the defendants had individual representation, in most cases more than one lawyer. Several of the reasons which prompted the out-of-county schools to coalesce were not present in Marion County. Although the non-Marion County schools added to the case are from distinct towns and each had its own regular school attorney from the respective town, each of these lawyers was a member of a small law office without the resources, and likely without the desired federal court litigation experience, to handle a case of this magnitude. The desire of the outside schools for a litigation specialist and their desire to obtain such services at the lowest possible cost, prompted this group of outside Marion County schools to join together to hire the law professor. The Marion County township schools were each advised on a regular, non-litigation basis by an Indianapolis law firm. When these schools were dragged unwillingly into the IPS case regular counsel stood ready, willing, and indeed very able to defend their individual clients.

The non-Marion County schools tried to present a united effort to resist the encroachment from the city into their domain as forcefully as possible. Other alternatives, such as voluntary acceptance of black students from IPS, were never seriously con-

[220]The reference is to the firing of special Watergate prosecutor Archibald Cox and the resignation of Attorney General Elliott Richardson and Assistant Attorney General William Ruckelshaus. Both resigned rather than carry out Nixon's order to fire Cox.

sidered.[221] In taking this position the elected school board members were undoubtedly accurately reflecting the desires of their constituents as well acting consistently with their own convictions. Some of the board members felt that even a public suggestion of compromise would be certain political suicide. Some of the defense lawyers pride themselves on the fact that the lawsuit did not become a heated political issue in the Indianapolis suburbs. These lawyers' efforts to ease tensions were no doubt valuable, but the principal reason the case did not result in political turmoil was that the vast majority of the people in the suburbs believed that maximum resistance was the only conceivable course to pursue. Any dissenters were deafeningly silent.

The independence of the suburban schools was only slightly diluted by the time of trial. The townships school corporations continued to be represented by their own counsel, but for purposes of trial there was a cooperative, voluntary separation of functions. A pattern developed whereby the positions taken by the leaders of this group of attorneys were routinely followed by other attorneys in the group.[222]

Each of the added school defendants made a prompt and vigorous effort to dispose of the case. The early pleadings indicated a substantial amount of duplication of effort. These pleadings demonstrate independent thought and legal research by each attorney, a characteristic which diminished as the case progressed. Despite all this independent effort, the new defendants responded in essentially the same manner. None took an approach drastically different in substance from any of the others, though various methods of presenting the legal positions were utilized.

Two principal legal responses were raised. First, the defendants contended it was basically unfair, and a violation of due process, to bring new defendants into the lawsuit after three years of litigation and apply the results of the already concluded trial to those defendants. Second, the defendants asserted the court had no judicial power over any suburban school until a finding was made that the school was guilty of unlawful segregation. The suburban schools were able to raise this jurisdictional issue at the early motion to dismiss stage because the Justice Department action which brought them into the case did not make any allegations that these additional school corporations were guilty of any unlawful discriminatory acts. The Justice De-

[221] Confidential personal interview.

[222] The attorneys for the Beech Grove City Schools and the school town of Speedway endeavored to separate their clients from the township school corporations. *Id.*

partment had merely served each defendant with a summons accompanied by a copy of the judge's order that the particular defendant be made a party to the case. The defendants' position was stated in terms of a constitutional absence of federal judicial power. The suburban schools argued that since there was not even an issue of whether any school was guilty of unconstitutional activity, the judicial power of the United States district court, as defined by article III of the United States Constitution, did not extend to the schools.[223]

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[223]Several less basic legal positions were asserted by the added defendants as grounds for their immediate dismissal from the case. Some schools contended that their joinder was in violation of rule 20, the Federal Rules of Civil Procedure. Most defendants asserted that the court's order joining them was contrary to a provision of the Civil Rights Act, 42 U.S.C. § 2000 c-6. This statute empowers the Attorney General to initiate an action to desegregate schools and requires him to certify that he has received from a parent in the school district, a complaint alleging unlawful discrimination. The defendants charged the court's order joining them as parties was in violation of rule 7 of the local rules of the court. The defendants alleged that this rule afforded them a right to respond to the motion of the United States to join additional parties before the joinder order was signed by Judge Dillin. Some of the defendants challenged the sufficiency of the process which was used to bring them into the case. Some moved to dismiss the action on the grounds that rule 4(d), Federal Rules of Civil Procedure, had not been satisfied. This rule requiring service of the summons and complaint together, had allegedly not been satisfied because no complaint against them was filed. Some of the added schools asserted that the order bringing them into the case was in violation of rule 8(a), Federal Rules of Civil Procedure, because there was no demand for judgment or relief against the added defendants. There was a motion to dismiss on the ground that the requirement of rule 10, Federal Rules of Civil Procedure were not followed. Rule 10 establishes the form for pleadings. Another motion to dismiss was on the basis that there was not a pleading signed by an attorney as required by rule 11, Federal Rules of Civil Procedure. There was a motion to dismiss for failure to join indispensable parties, the position being made that all schools in the Indianapolis Metropolitan statistical area were indispensable parties, if any of these were to be joined. This position was afforded some dignity two years later when five more additional out-of-county schools were joined on the court's order.

One defendant charged that the action could not be prosecuted against it unless all members of the Indiana General Assembly were joined as defendants. This position was based on the proposition that "by reason of Article 8, § 1 of the Indiana Constitution the General Assembly has the exclusive right and power to determine how and by what instrumentality the education system of the State of Indiana shall be administered and carried into effect." IND. CONST. art. 8, § 1.

There was a motion to dismiss on the grounds that the requirements of rule 24, Federal Rules of Civil Procedure, had not been satisfied in that intervention was not timely, it raised no new issues, there was no showing that disposition of the case would impair or impede the ability of the plain-

One attorney at one point moved to dismiss on the basis of his very candid, if not discreet, statement that:

> the court has usurped the prerogatives of the original parties plaintiff and defendant to frame the issues and determine the parties to the litigation. . . . The Court has carried judicial activism to the illogical extreme where it and not the parties determine the course of litigation. Instead of serving as an impartial Judge, it has become an active participant in the litigation.[224]

Various forms of pleading were used by the new defendants to present these theories to dismiss the case against them immediately. Some defendants raised the same theory in different forms as many as three times during the fall of 1973. Most of the added defendants responded in a traditional way to the service of process by filing a pleading in the district court, usually a motion to dismiss. But some reacted more dramatically. The law professor immediately filed an original action in the United States Court of Appeals for the Seventh Circuit seeking an injunction preventing Judge Dillin from proceeding further with the case against his clients. This petition was based essentially on the two basic theories discussed above. The Seventh Circuit denied the petition before the end of September of 1973.

The attorney chose this unorthodox response because he felt his legal principles were valid but he did not feel they would be fairly considered by Judge Dillin.[225] This complaint would be frequently voiced by counsel for the added defendants during the course of the litigation. Regardless of the validity of the criticism in another context, it is particularly suspect when he and his clients had not yet appeared in the district court. This action established very early in the remedy stage of the case an adversarial relationship between Judge Dillin and defense lawyers.[226]

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tiffs to protect their interests, and there was no showing that anybody was not adequately represented.

Several of the new defendants moved to dismiss the action against them on the grounds that the original lawsuit filed by the United States had been prosecuted to judgment and any action against them should be docketed as a separate action on the basis of rule 79(a), Federal Rules of Civil Procedure.

One of the defendants moved "for relief," from the court's order joining it as a party, on the basis of rule 60(b), Federal Rules of Civil Procedure, alleging that the judgment in the original action had been satisfied when IPS had filed a report describing how it would eliminate discrimination and the original plaintiff, the United States, had "acceded" to the report.

[224]Defendants' motion to dismiss.

[225]Confidential personal interview.

[226]The action in the United States Court of Appeals for the Seventh

The defense lawyers made many other efforts to obtain relief from the Seventh Circuit or the United States Supreme Court[227] before Judge Dillin took any action resembling a final order against them. Within six weeks after the September 7, 1971 order which joined the additional defendants there were at least six more pleas to the Seventh Circuit. Some of these pleadings suggest a frantic, irrational atmosphere. On September 27, 1971, one of the suburban school corporations petitioned the court of appeals for an order requiring Judge Dillin to rule on motions filed by the school on September 14, 1971 and September 21, 1971. The petition also prayed that the court of appeals enjoin the judge from proceeding further until he ruled on these pending motions. This all happened within three weeks of the order joining the school as a party. The motions at issue in this petition were ruled on by Judge Dillin on October 1, 1971, and the petition for a writ of prohibition was denied by the court of appeals on the same day.

In addition to the efforts to have the added defendants dismissed from the case, a basic objective of the added defendants was to take the case out of Judge Dillin's court, the judge responsible for their being brought into the case. The major effort in this regard was a protracted attempt to have the case heard by a three-judge federal court pursuant to 28 U.S.C. § 2281. The added defendants' principal difficulty was to find an issue involving a statute or regulation with statewide application.[228] Judge Dillin ultimately held there was no such statute or regulation at issue in the case and for that reason a three-judge court was not appropriate. This decision was affirmed by the Seventh Circuit.[229]

The flurry of legal maneuvers continued throughout the remainder of 1971. Judge Dillin held a pretrial conference with all attorneys on December 20, 1971. At the closed pretrial conference the judge reportedly tried to persuade the parties to negotiate a voluntary desegregation plan.[230] Following the 1971

Circuit for a writ of prohibition against Judge Dillin plainly was not solely responsible for the strained relationship between the judge and the attorneys.

[227]It is this writer's belief these interlocutory appeals and original actions in the appellate courts did not significantly delay the litigation in district court.

[228]The United States Supreme Court has interpreted 28 U.S.C. § 2281 as requiring a three-judge district court only when the state statute under challenge is one having statewide application. *See, e.g.*, Moody v. Flowers, 387 U.S. 97 (1967).

[229]United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

[230]If Judge Dillin's subsequent efforts to settle the case are a reliable guide to what transpired in 1971, he likely used strong language. At a pre-

pretrial conference, the judge entered a blanket order on December 30, 1971, denying all pending motions.[231] Of all the voluminous procedural pleadings which had been filed since September 7, 1971, only the three-judge court issue was left unresolved by the district court.

This sweeping and symbolic order had an obvious impact.[232] The defendants appear to have accepted for the first time that it was inevitable they would have to litigate the issues. Within two weeks of this order several of the defendants voluntarily withdrew appeals pending in the court of appeals and the added defendants began to file answers to the complaint of the intervening plaintiffs Buckley.

Whatever the effect of the judge's order on December 30, 1971, the only significant activity in court during all of 1972 was the sideshow in September involving Schools 111 and 114.

V. The 111-114 Controversy

IPS School 114 was new when schools opened for the fall term of 1972. The controversy surrounding the opening of the new school was a heated emotional event in Indianapolis and one which may have had significant long term ramifications nationally as well as in Indianapolis. School 114 was erected three blocks from School 111 to facilitate increased enrollment in the School 111 district in the extreme southeastern portion of the IPS system. The School 111 district had historically been all white. School 111 was an all-white school until two low income public housing projects opened in the neighborhood in 1971. When the two projects came to be inhabited almost totally by blacks, the traditional racial composition of School 111 was drastically altered.

When IPS made plans to open School 114 in the fall of 1972, it was operating under the orders issued by Judge Dillin as part of his decision finding IPS to be unlawfully segregated on August 18, 1971. On June 6, 1972, the IPS board approved Resolution 1020,[233] which established School 114 as a K-6 school. All 7th-

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trial conference three years later in December 1974, Judge Dillin told the assembled attorneys (including this writer) that they could either make a good faith effort to settle the case or they could "roll the dice" with their corporate existence at stake.

[231]Motions which were denied in this order included motions to dismiss, motions to docket the action separately, motions for more definite statement, motions to strike, motions suggesting that the action was not properly prosecuted by the intervening plaintiffs as a class action, and motions requesting the court's abstention. Entry 12/30/71.

[232]The ruling is symbolic in that it came on the next to the last day of the year indicating Judge Dillin's desire for a fresh start in 1972.

[233]Minutes, book mmm, at 2341 (1971-72).

and 8th-grade students in the district would attend School 111. School 114 was designed to be a model experimental school (revolutionary for IPS) utilizing such educational techniques as open classrooms, and the 114 building was constructed with open classrooms. IPS Resolution 1020 assigned students from a portion of the School 111 district to School 114 for the 1972-73 school year. IPS predicted that under Resolution 1020 School 111 would be 38.4 percent black and School 114 would be 39.5 percent black.

Less than one month after Resolution 1020 was approved, there was a change in the membership of the IPS Board. In the May 1971 election, seven new school board members were elected. The successful slate of candidate had campaigned on an anti-busing platform with a commitment to resist forced integration. Four of these newly elected members took office on July 1, 1972;[234] the other three would commence their 4-year term on July 1, 1974.[235]

On August 21, 1972, two weeks before the first day of classes, the new IPS Board adopted Resolution 1027,[236] which repealed Resolution 1020. Resolution 1027 made significant changes in the organization of School 114 and its relationship with School 111. The new resolution altered the IPS majority-to-minority transfer rule by providing that kindergarten pupils assigned to School 114 would have the option of attending School 111. The resolution changed School 114 to a K-8 school, providing that some junior high teachers would teach at both schools, since there were not enough students for two complete junior high school programs. The resolution eliminated the experimental program at School 114 and ordered immediate construction to convert the open classrooms to traditional classrooms and to add facilities for the junior high classes. The resolution altered the district boundaries for the two school so the predicted enrollment for the fall term would be 31.8 percent black for School 111 and 47.7 percent black for School 114.

Some of the black residents of the two housing projects in the area believed the changes in the new school were racially motivated and felt the elimination of the anticipated innovative programs would adversely affect the quality of the education their children would receive. On Friday, September 1, 1972, resi-

[234]The board members who took office on July 1, 1972 were Carl Meyer, Constance Valdez, Paul Lewis, Lester Neal. Minutes, book nnn, at 1 (1972-73).

[235]The board members who took office on July 1, 1974 were Martha McCardle, William M.S. Meyers, Fred Ratcliffe. Minutes, book ppp, at 7. (1974-75).

[236]*Id.*, book nnn, at 212 (1972-73).

dents of the project consulted lawyers of the Indianapolis Legal Services Organization (LSO).[237]

School opened as scheduled on Tuesday, September 5, 1972, with the new Resolution 1027 dictating the operation of School 114, except that the required construction was in progress. It was estimated the construction would continue for four months. On September 7, 1972, LSO lawyers filed, on behalf of three black mothers from the projects and their children, a motion to intervene in the IPS school desegregation case. The intervenors, proceeding in forma pauperis, sought to enjoin the changes ordered by Resolution 1027 and to have the board members held in contempt of court for acting contrary to the court's orders of August 18, 1971.

The intervenors alleged the optional zone for kindergarten was inconsistent with a new IPS majority-to-minority transfer policy which was adopted pursuant to the court's order. The policy provided a student could transfer only when he was in the racial majority at his school, and then he could transfer only to any school where he would be in the minority. The intervenors further alleged the opening of School 114 with 47.7 percent black students violated the court's order that no school, not already over the tipping point of 40 percent black students on August 18, 1971, would be permitted to go past that point pending formulation of a final remedy for the case. The intervenors also alleged the elimination of the innovative features of School 114 denied them an equal educational opportunity, *i.e.* denied them equal protection.

The intervenors' application for a temporary restraining order was denied, but Judge Dillin set the motion for a preliminary injunction to be heard by the court on the following Wednesday, September 12, 1972. At the preliminary injunction hearing IPS board members and administrators testified as to the reasons for the last minute changes. They testified that discipline was so deteriorating at School 111, especially with the black 7th- and 8th-grade students from the housing projects, that it was necessary to transfer some of them to School 114. The open classrooms at 114 would in their opinion hinder efforts to control students.[238] The board members testified that it was their understanding, based on a vague reference to advice of counsel, that the court's tipping point order did not apply to new schools.[239] As precedent

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[237]Confidential personal interview.

[238]See generally testimony of Karl Kalp, Sept. 14, 1972. Record, vol. II, at 242-301; testimony of Carl J. Meyer, Sept. 13, 1972. *Id.*, vol. I, at 202-35; testimony of Kenneth T. Martz, Sept. 14, 1972. *Id.* at 302-18.

[239]Cross-exam of Carl Meyer by Mr. Moss, Sept. 13, 1972. *Id.* at 223; cross-exam of Carl Meyer by Mr. Larson, Sept. 13, 1972. *Id.* at 230.

they cited the unchallenged opening of School 48 in September of 1971, immediately after the order, with over 90 percent black enrollment.[240]

The board's action demonstrated a significant and immediate change in IPS philosophy when the new board members took office on July 1, 1972, accompanied shortly thereafter by a new superintendent of schools. The original plans for School 114 were conceived by the retiring school board and its superintendent Stanley Campbell. When the new board members took office on July 1, 1972, one of their first acts was to fire Stanley Campbell[241] and replace him with Karl Kalp, a career IPS teacher and administrator. Kalp testified at the hearing that there was no evidence the open classrooms planned for School 114 would provide a superior educational advantage.[242]

The new board members took the 111-114 issue as an opportunity to demonstrate to the community that they intended to actively pursue their political objectives. The issue also gave the new board members an opportunity to demonstrate their courage to challenge Judge Dillin and at the same time test his determination. The controversy probably resulted from the rhetoric of the election campaign. Superintendent Kalp testified that but for a petition from white parents in the 111-114 district the changes likely would not have been made.[243] These parents were undoubtedly encouraged by the anti-integration theme of the school board campaign.

At the conclusion of the hearing on Saturday morning, September 16, 1972, Judge Dillin gave his ruling as part of a wide-ranging 2-hour oration from the bench, in the presence of all seven members of the school board.[244] Judge Dillin held that the school board had succumbed to pressure from white parents in the district to make School 111 a white school and School 114 a black school. The judge found that in responding to these demands the board had violated the court's order of August 18, 1971, and had also committed a new separate act of unlawful segregation.

The judge ordered Resolution 1027 annulled and Resolution 1020 reinstated. This meant all junior high students would go back to School 111, kindergarten pupils would attend the school

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[240]See, *e.g.*, cross-exam of Robert De Frantz, Sept. 13, 1972. *Id.* at 165.

[241]One of the campaign promises of the successful slate of candidates in the 1972 election was that Stanley Campbell, the IPS Superintendent of Schools, would be fired immediately.

[242]Direct exam, Karl Kalp, Sept. 14, 1972. Record, vol. II, at 252.

[243]*Id.* at 260-61.

[244]Statement and findings by the court, Sept. 15, 1972. *Id.*, vol. III, at 397-442. The ruling was issued in written form on Sept. 28, 1972.

in their district, and School 114 would utilize open classrooms. The ongoing construction at School 114 was reversed.

Judge Dillin did not hold the board members in contempt of court but severely reprimanded them for taking the action without approval from the court.[245] The judge characterized his 2-hour lecture as a civics lesson for board members. In recognition of the recent campaign, Judge Dillin told the board members he understood the facts of political life. He said they could campaign on any platform they wanted, but if their proposals were unlawful, as they were here, the campaign promises could not be carried out.[246]

In promulgating a remedy, Judge Dillin ordered actions which had not been requested by LSO lawyers. Evidence at the trial had revealed actual black student enrollment at both schools was significantly higher than the projected figures used by IPS prior to the opening of school. Actual enrollment figures showed School 111 opened with 37 percent black students and School 114 with 52 percent black students. The black student population for the two districts combined was 45.2 percent.[247] Judge Dillin said these figures demonstrated that the tipping point, at least for this neighborhood, was obviously lower than 40 percent.[248] Judge Dillin ordered IPS to submit immediately a plan for reducing the enrollment at both schools to not more than 35 percent black students. The only proviso was that this level not be reached by one-way busing of black students out of Schools 111 and 114. The school board's response was to exchange black students at Schools 111 and 114 with white students from two other nearby schools, Schools 21 and 82.

On Thursday, September 21, 1972, the school board held a meeting to discuss a plan to be submitted to the court. Simultaneously IPS administrators planned meetings at each of the four schools to meet with parents. A large number of white parents left the IPS meeting at School 21 and School 82 to descend en masse on the school board meeting. The white parents were angry and disruptive. Indianapolis police were called, and responded with a sizable force to control the crowd. The purpose of the demonstration was said to be for the white parents to advise the school board that they would boycott the school if the court's order was implemented.[249]

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[245]Statement and findings by the court, Sept. 15, 1972. Record, vol. III, at 397-442.

[246]*Id.* at 426.

[247]It is believed these statistics demonstrate substantial white flight from the 111-114 neighborhood during the summer of 1971.

[248]Statement and findings, *supra* note 245, at 439.

[249]Star, Sept. 22, 1972, at 1, col. 2.

Once the crowd was controlled, the board voted to approve the staff proposal for complying with the court order. The seven-member board voted four to zero to approve the plan. Three of the four newly elected board members abstained. One of the abstaining members was quoted by the *Indianapolis Star* as saying she could not vote for the plan because it contemplated busing, but she would not vote against it for fear of a contempt of court citation.[250] The board also voted to appeal the court's order.

The next day, Friday, September 22, 1972, IPS attorneys[251] traveled to Terre Haute, Indiana, where Judge Dillin was conducting a trial, to plead for a stay. In a brief pleading, IPS attorneys alleged "a volatile and potentially uncontrollable situation" existed at the schools. Judge Dillin granted a stay of the portion of the order which involved Schools 21 and 82 pending appellate review of the order and the August 18, 1971, decision.[252] The rest of the 111-114 order remained effective, but the disruptive activities of the white parents had been successful in obtaining their objective of preventing the busing of their children.

The LSO involvement in the case was an emotional issue in Indianapolis and drew national attention through the presidential campaign commentary of Vice President Spiro T. Agnew. Agnew was highly critical of Office of Economic Opportunity-financed lawyers becoming involved in school desegregation litigation. Agnew frequently pointed to the Indianapolis case as an example. It is believed the attention drawn to the Indianapolis case by Agnew was a factor which led to a provision of the Legal Services Corporation Act, which prohibits the use of Legal Services Corporation funds for "legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school or school system."[253]

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[250] *Id.* The three board members who refused to vote were Paul E. Lewis, Lester Neal, and Constance R. Valdez.

[251] The IPS Board was represented by new legal counsel at the 111-114 trial. During the May 1972 campaign, the successful slate of candidates had pledged to fire Baker & Daniels as school board counsel. This proposal was a companion to the pledge to fire Superintendent Stanley Campbell. Shortly after the new board members assumed office on July 1, 1972, Baker & Daniels was replaced as legal counsel for IPS by the Indianapolis firm of Bredell, Martin, and McTurnan. Lawrence McTurnan of that firm has been principal counsel for IPS since that time. On July 6, 1976, four newly elected board members took office and promptly appointed Bamberger and Feibleman as the board's new legal counsel.

[252] The court's order regarding schools 111 & 114 was affirmed by the United States Court of Appeals for the Seventh Circuit. 474 F.2d 81 (7th Cir. 1973).

[253] 42 U.S.C. § 2996f(b)(7) (Supp. IV, 1974).

The participation of LSO in the case was also politically unpopular in Indianapolis and ultimately played a role in its losing about one-third of its funding.[254] In 1972, approximately one-third of roughly one-half million dollars was received from the Department of Housing and Urban Development Model Cities program. This money was allocated by the Indianapolis City-County Council. The bulk of the remainder of the LSO budget came directly from the Office of Economic Opportunity. When the question of refunding LSO for 1973 was discussed by the city-county council in the fall of 1972, there was formidable opposition and extended public discussion. The funding was approved only after stringent restrictions were placed on LSO lawyers. One year later, the debate was renewed and the funding was withdrawn.[255]

Another Indianapolis institution felt the bite of the school desegregation case as a result of the 111-114 controversy. The Indianapolis Urban League operated a social service program at Clearstream Gardens, one of the housing projects in the 111-114 district. When the residents of this project became involved in the 111-114 issue the Urban League petitioned to participate as amicus curiae.[256] As a result of this involvement, the Urban League, which receives nearly all of its funds from the Indianapolis United Way, nearly lost its funding.[257]

Inspired primarily by the *Westside Messenger*, a neighborhood newspaper, a demonstrable number of industrial employees in Indianapolis withheld their pledges to the United Way during the 1973 fund-raising campaign. The United Way responded by imposing new guidelines on the advocacy activities of affiliates. No specific guidelines were ever adopted, but the United Way made it clear that if an issue as emotional as the busing issue came along again, and an agency's involvement in the issue hampered United Way fund raising, the agency would not be further funded.[258] The *Indianapolis News* reported that during the 1973 United Way Campaign, IPS Board member Fred Ratcliff introduced a resolution proposing that the IPS Board request that IPS employees refuse to contribute to United Way if the funds "go to groups whose policies are inconsistent with this board's."

A lawsuit was filed in Marion County Circuit Court to enjoin United Way from funding Urban League. The circuit court

[254]Confidential personal interview.

[255]*Id.*

[256]Motion for leave to file brief amicus curiae, September 13, 1972.

[257]This author participated in the controversy as a member of the Board of Directors and subsequently as vice president of the Indianapolis Urban League.

[258]Confidential personal interview.

judge was John Niblack, the judge who tried to obtain impeachment of Judge Dillin for his actions in the school desegregation case. Judge Niblack had earlier stated that he was withholding his personal contributions to the United Way as long as it funded the Urban League and as long as the Urban League was "pro busing."[259] Many people felt, but nobody ever proved, that Niblack was personally responsible for the case being filed in his court. The case was venued out of Marion County at the earliest possible moment and was eventually dismissed.[260]

VI. The 1973 Remedy Trial

A. The Issues

When the remedy trial[261] commenced on June 12, 1973, defense counsel were very dissatisfied with the specification of issues and with what they characterized as totally inadequate response to their pretrial discovery efforts.[262] The defense lawyers held Judge Dillin and the attorneys for the intervening plaintiffs responsible for these two grievances. The lack of specification of issues is in large part attributable to the fact that the law relating to interdistrict remedies was in the early stages of development. The burdens of litigating a developing area of law, always a factor in this case, were particularly noticeable during the 1973 trial.

Several significant and symbolic events occurred during the course of the trial which demonstrated the level of uncertainty. On the first day of the trial, the United States Court of Appeals for the Sixth Circuit, sitting in Cincinnati, Ohio, a hundred miles away, decided the case of *Bradley v. Milliken*.[263] *Milliken* was the

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[259]See letter, Niblack, J. to Craine, J., Intervening Plaintiffs' Exhibit 5. Record, vol. IV, at 725.

[260]The *Indianapolis News* reported that during the 1973 United Way campaign IPS Board member Fred Ratcliff introduced a resolution proposing that the IPS Board request IPS employees to refuse to contribute to United Way if the funds "go to groups whose policies are inconsistent with this board's." Reggie Bishop of the *News* reported that "although Ratcliff did not single out any particular organization in his proposal, a memo from him to school board members specifically cited the Indianapolis Urban League." News, Sept. 5, 1973, at 15, col. 1.

[261]This segment of the case is frequently called the remedy trial. The suburban school defendants have persistently objected to this designation. It is their position that no suburban school can be included in the remedy desegregating IPS until the court has made a finding that the suburban school has committed a constitutional violation.

[262]Confidential personal interview.

[263]484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

first decision in which a United States court of appeals had upheld a desegregation plan ordering an interdistrict remedy.[264]

During the course of the trial, the United States Supreme Court decided *Keyes v. School District No. 1.*[265] Prior to *Keyes,* there was discussion about which specific schools in the IPS system had been found to be de jure segregated. After the Supreme Court's opinion in *Keyes,* it was generally accepted that at a minimum the entire IPS system would be involved in the desegregation plan. Finally, during the course of the trial the United States Supreme Court denied certiorari to the Seventh Circuit decision affirming Judge Dillin's August 18, 1971, order which found IPS unlawfully segregated.[266] Judge Dillin's frame of mind regarding the state of the law was aptly summarized from the bench when he said, "Really we are out here in the wilderness without much precedent one way or the other."

The issues were at least partially framed by the amended complaint of the intervening plaintiffs Buckley. The Buckley complaint contained two prayers for relief. The complaint asked the court to

> adjudge, decree and declare that . . . [two Indiana statutes][267] are unconstitutional, null, and void, insofar as they effect racially separate public schools and school systems in Marion County and the Indianapolis metropolitan area.[268]

This is the pleading which raised issues regarding the impact of Uni-Gov on the desegregation of schools. Buckley's second prayer for relief asked the court to create a countywide school system in Marion County.[269]

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[264]The United States Court of Appeals for the Fourth Circuit had previously held that an interdistrict remedy was not legally possible. Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), *aff'd per curiam by an equally divided Court,* 412 U.S. 92 (1973).

[265]413 U.S. 189 (1973). In *Keyes,* the Court held that a finding of unlawful segregation in a "meaningful portion" of a school system constitutes a prima facie showing of unlawful discrimination throughout the system. Thus, a systemwide remedy is required unless the school can prove the segregation in the other segments of the system is unintentional.

[266]Board of School Comm'rs v. United States, 413 U.S. 920 (1973).

[267]IND. CODE § 20-3-14-1 (Burns 1975), a statute regulating school corporation annexation in Marion County, Indiana; *id.* § 18-4-1-1 (Burns 1974), the Indianapolis Marion County unified government bill and the companion "freeze of IPS boundaries."

[268]Amended Complaint at 7 (filed Oct. 21, 1971).

[269]The second prayer for relief of the amended complaint read,

> Plaintiff-intervenors further pray that the defendants, their agents, servants, employees, and all persons in active concert or par-

Some further illumination of the issues being tried, at least the court's perception of the issues, is found in the opinion filed by Judge Dillin at the conclusion of the trial. While it is recognized that this statement came after the trial, Judge Dillin probably explained his understanding of the case to counsel in essentially these terms at the pretrial conference held the day before the trial.

In the opinion Judge Dillin said,

> The issues of fact submitted for trial are as follows:
>
> 1. Whether or not desegregation of IPS within its present boundaries (sometimes referred to as an "Indianapolis Only Plan") can be accomplished as required by the equal protection clause of the Fourteenth Amendment in such a manner as to "work," within the meaning of Green v. County School Board: "The burden on a school board today is to come forward with a plan that promises realistically to work . . ."
>
> 2. Whether or not any of the added defendant officials of the State of Indiana, their predecessors in office, or the added defendant The Indiana State Board of Education have acted to promote segregation, or failed to carry out duties imposed upon them by law in such a manner

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ticipation with them be preliminarily and permanently enjoined and restrained to take forthwith all steps reasonably necessary to secure to plaintiff-intervenors their right to attend racially nonsegregated and nondiscriminatory schools and school systems, including if necessary:

(a) the consolidation or merger of the defendant school systems in all respects of school operation and administration, including but not limited to, the appointment of an acting superintendent to manage the consolidated systems, the merger of the existing Boards of Education pending the selection by election, appointment, or otherwise of a new Board of Education representative of the consolidated system, and further requiring that board shall be the successor Board of Education for the defendant school systems assuming all rights, powers, responsibilities, duties, and obligations presently held, in whole or in part, by the defendant school boards; and further requiring that each defendant shall, by withholding of funds or accreditation and by the exercise of any and all powers available to each, insure the full cooperation of the other defendants and the prompt accomplishment of said consolidation or merger; or

(b) the adoption and implementation by all defendants of such agreements, contracts, or other arrangements with respect to the operation of educational systems in the Indianapolis metropolitan area as will secure to plaintiff-intervenors equal educational opportunities in non segregated and non discriminatory schools and school systems.

Id. at 7-8.

as to promote segregation or inhibit desegregation within IPS.

3. Whether or not any of the added defendant school corporations have acted to promote segregation either within IPS or within their own boundaries.

The issues of law presented are as follows:

1. Whether or not acts of *de jure* segregation heretofore found to have been practiced by IPS can be imputed to the State of Indiana such that appropriate State officials or agencies may be directed to afford relief to vindicate the Fourteenth Amendment rights of plaintiffs and their class.

2. Whether or not appropriate State officials or agencies have the power to direct reorganization of IPS with other school corporations, or to direct the transfer or exchange of IPS pupils to or with other school corporations in order to vindicate such rights.

3. Whether or not this Court may act in the manner just described to vindicate such rights if responsible officials or agencies of the State fail to do so within a reasonable time.[270]

The first issue before the court was whether IPS could be satisfactorily desegregated within its own territory. Judge Dillin had to decide whether an IPS-only desegregation plan would satisfy the requirements of *Brown II*[271] and *Green v. County School Board.*[272] The parties did not seem to have any trouble identifying evidence which was relevant to this issue. The difficulty was with the second issue. Assuming Judge Dillin found that an IPS-only plan would not be a satisfactory remedy, what principles of law would permit or require him to order a remedy including the suburban schools?[273] The lawyers' difficulty was in knowing what facts would be relevant to prove the presence or absence of these principles.

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[270]United States v. Board of School Comm'rs, 368 F. Supp. 1191, 1197 (S.D. Ind. 1973).

[271]349 U.S. 294 (1955).

[272]391 U.S. 430 (1968) (referring to a plan that will realistically work).

[273]368 F. Supp. at 1197-1205. The lawyers for the suburban schools were convinced from the outset that Judge Dillin would find that an IPS-only plan would not be satisfactory. In the 1971 opinion Judge Dillin said,

> the easy way out for this Court and for the Board would be to order a massive "fruit basket" scrambling of students within the School City during the coming school year, to achieve exact racial balancing, and then to go on to other things. The power to do so is undoubted. There is just one thing wrong with this simplistic solution: in the long haul, it won't work.

332 F. Supp. at 678.

John O. Moss and John Preston Ward, attorneys for the Buckleys, suggested several theories during the trial as a basis for an interdistrict remedy. They argued that both the State of Indiana and the suburban schools had an affirmative responsibility to eliminate the unlawful segregation in the Indianapolis metropolitan area, and their failure to fulfill this affirmative responsibility was the basis for including suburban schools in the desegregation plan ordered by the court.[274] Furthermore, intervening plaintiffs attempted to prove the suburban schools were guilty of discriminatory practices in the hiring of teachers and non-certified staff personnel, proposing this discrimination as a basis for including them in the desegregation plan. The intervening plaintiffs continued to pursue a "Uni-Gov theory" without any clear specification of the relevance of Uni-Gov. In his closing argument, one of the attorneys asked the court to "declare Uni-Gov unconstitutional."[275] There were some vague references during the course of the trial to acts of segregation by the Housing Authority of Indianapolis in the placement of public housing projects, but this issue was not fully litigated. Mr. Moss also suggested at one point that the suburban schools had located their school buildings on sites that had the effect of perpetuating all-white schools in the district.[276]

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[274]This theory would not necessitate a showing of unlawful discrimination by either the state officer defendants or the suburban school defendants. The basis of their involvement in the remedy would be the failure to perform an affirmative obligation to eliminate segregation caused by the unlawful acts of IPS.

[275]Record, vol. XV, at 262-63 (July 6, 1973); opening statement, Mr. Moss, June 12, 1972, record, vol. I, at 3. A judicial declaration that Uni-Gov is unconstitutional would not assist in the desegregation of IPS schools. The only result of such a decision would be that the boundaries of the Civil City of Indianapolis would recede to the old city limits, a separate city council and county council would be reinstituted and the various unified administrative departments of government would be dismantled. It is unclear whether the repeated prayers of the counsel for the intervening plaintiffs to declare Uni-Gov unconstitutional are the result of an imprecise specification of issues or whether they were actually attempting to use the school desegregation case as a way of getting rid of Uni-Gov.

[276]This issue was not pursued by the intervening plaintiffs in their presentation of evidence and has not been an issue in the case. At the time of trial only two of the suburban districts (Pike and Washington Townships) had a large enough percentage of black students that isolation of blacks could conceivably have been a factor in their decisions relating to the location of schools. Washington Township schools had an excellent record of race relations. Judge Dillin commented during the course of the trial that had all other school systems acted similarly to Washington Township none would be in court.

B. Litigation Strategies

The independence of the suburban school districts continued throughout the trial. There was discussion among counsel for suburban schools about choosing a chief trial lawyer for the group and delegating to him the principal trial responsibility.[277] Due to what the individual suburban schools, or their lawyers, perceived as diverse interests, this was not done. Each of the 20 suburban schools districts was represented at the trial by counsel; each had complete freedom to call witnesses, present evidence, cross-examine witnesses, raise objections to evidence and conduct the litigation as he deemed appropriate. Despite this formal independence the defense of the township schools was a cooperative effort. Areas of factual development and cross-examination were loosely assigned to lawyers and this arrangement was respected by the defense lawyers. In the words of one of the unofficial leaders of this group of lawyers, "All of the attorneys acted with great restraint."[278]

The burden of such a large group of defendants was minimized by a ground rule established by Judge Dillin the first day of trial. When an evidential objection was made by a defendant, the objection would be deemed to have been raised by each defendant unless a defendant opted to be excluded from the objection. This ruling came about the second time an objection was made and 19 lawyers automatically stood in order and said, "Your honor, we join in that objection."

The schools outside Marion County did not participate in the cooperative defense of the township schools. These schools attempted to emphasize the differences between schools inside and outside Marion County. In an incident reminiscent of international politics, their attorney demanded and got a separate counsel table for non-Marion County school defendants. This strategy was based on the very pragmatic position that even if Judge Dillin decided to order a metropolitan plan, he might be persuaded to limit the plan to Marion County.[279]

The strategy of the state officer defendants[280] is difficult to evaluate. These defendants would not be concretely affected by the decision in the same way as the suburban schools. It appears their strategy was to resist as forcefully as possible whatever the court tried to do and to defend as a matter of principle the honor and integrity of the officials of the State of Indiana. Apparently,

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[277]Confidential personal interview.

[278]*Id.*

[279]*Id.*

[280]The Governor, the Attorney General and the Superintendent of Public Instruction.

this strong resistance was motivated by a political philosophy which does not tolerate a federal court's reviewing the actions of state officials and local school authorities.

The United States continued as the "plaintiff" in the case but during this trial the Justice Department was more nearly aligned with the defendants than with the intervening plaintiffs. The position of the Justice Department was reported to the court in the opening statement of the Justice Department lawyer:

> [T]he United States has stated no claim against the added defendants here, such as the claim stated by the plaintiff intervenors. As we stated in our pre-trial submission in December of 1971, if it is shown that the added defendants have engaged in inter-district violation, that is to say a constitutional violation that in some manner involves two or more school systems, then some relief against them may be warranted. On the other hand, if no inter-system violation is shown, we do not believe that either the facts to be adduced at this hearing or the laws of the United States, would authorize the imposition of an inter-district remedy.
>
> The record will show that an intra-system desegregation plan can feasibly be fashioned and implemented in Indianapolis.[281]

This position of the Justice Department left counsel for the intervening plaintiffs as the only lawyers presenting evidence which would support an interdistrict remedy. It is difficult to evaluate the performance of these two lawyers, but the fact that they were out-gunned cannot be ignored. Without regard to the relative abilities of the lawyers, the resourses which were available to the two sides made the trial a mismatch. John Moss is a member of a three-person law firm in Indianapolis and John Ward is a sole practitioner. In opposition were school law specialists and trial lawyers from prominent Indianapolis firms; two law professors; a trial lawyer from the United States Department of Justice in Washington, D.C.; a lawyer from the office of the Indiana Attorney General; Corporation Counsel for the City of Indianapolis; and at least six other attorneys. One of the favorite luncheon topics of conversation of lawyers in downtown Indianapolis during June of 1973 was the "massacre in federal court."[282]

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[281]Record, vol. I, at 8-9 (June 12, 1973).

[282]Some individuals and organizations attempted to assist the intervening plaintiffs during the course of the trial. This author, at the request of the Indiana Civil Liberties Union, provided support for the intervening plain-

Given the limited resources available to counsel for the intervening plaintiffs and the cast disparity of person power, it is not surprising the case for a metropolitan plan was not as expertly presented as it might have been. The *Indianapolis Star* reported that Judge Dillin frequently interrupted questioning by counsel and took over the examination of a witness himself.[283] This practice drew the ire of defense counsel, who charged in open court that Judge Dillin was acting as an advocate rather than as a judge.[284] During the course of the trial, Moss and Ward were frequently criticized for not preparing witnesses prior to calling them to testify. Some witnesses commented that they did not know why they had been called to testify.[285] One attorney implored the judge to speed up the direct examination of witnesses, reminding the court that since there were 20 school corporations represented at the trial and they were paying their lawyers at least $50 an hour, the trial was costing the taxpayers of central Indiana about $1,000 an hour.[286] Judge Dillin at one point candidly pleaded with the attorneys to prepare their witnesses before putting them on the witness stand, saying, "I've done it all my life."[287]

C. The Evidence

The absence of clear, controlling legal principles resulted in the introduction of volumes of evidence having marginal relevance. The most obvious example of time-consuming, interesting, but largely irrelevant evidence is the testimony of the superintendents of the suburban schools. Intervenors' counsel called 20 suburban school superintendents to the witness stand.[288] Their testimony

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tiffs, limited research, and consulation on a narrow question of constitutional law.

[283]Star, June 14, 1973, at 31, col. 1.

[284]*Id.*

[285]Norman Morford, the deputy director of the Indiana Civil Rights Commission testified that he was in court because the director who was to testify was not available. Record, vol. I, at 79 (June 12, 1973).

[286]Star, June 15, 1973, at 39, col. 1.

[287]Record, vol. II, at 382 (June 13, 1973).

Those who are critical of plaintiffs' attorneys point to the brief they filed in the United States Court of Appeals for the Seventh Circuit as tangible evidence of inadequacy. The brief for the appeal from a two-week trial was less than 20 pages long. One-half of the brief was devoted to the question of whether the attorneys were entitled to attorney fees. On a brighter note, during a hearing Judge Dillin once commented that an oral argument presented by one of them was the most eloquent he had heard during the time he was on the bench.

[288]James R. Bales, Beech Grove, Record, vol. III, at 593-94; Earl Blemker, Greenwood. *Id.* at 493; William R. Curry, Mooresville. *Id.* at 581; H. Dean

provides a vivid picture of essentially all-white school systems, students, teachers, administrators and employees, in all but two of the suburban schools. The testimony does not, however, have any direct bearing on either of the two basic issues being tried: whether an IPS-only plan would result in resegregation of the IPS system and whether there was a legal basis for an interdistrict remedy. The lengthy testimony of these witnesses might be justified as an effort to unearth evidence of interdistrict violations, were it not for the fact that the intervening plaintiffs had deposed most of the superintendents prior to trial.

Intervenors attempted to show an absence of affirmative action by the suburban schools to eliminate the all-white aspect of their systems. This was clearly proven, except for Washington Township, but the courts have never accepted the proposition that the suburban schools have an obligation to promote integration. The attorneys for the intervening plaintiffs established that no significant black studies existed in any of the suburban schools. This is not surprising, since they do not have many black students, but it does not seem to have any legal significance. Counsel asked each of these witnesses about their land holdings for expansion. Most of the suburban schools had land available, but the relevance of that fact was never established. The superintendents were each asked about federal funds at their schools and many replied they received federal funds of one kind or another. It does not appear, however, that counsel ever argued that the receipt of federal funds was a legal ground for an interdistrict remedy.

Intervenors' attorneys established by testimony of school administrators that 78.7 percent of all the students in defendant suburban schools are bused to school. All of the Marion County township schools bused more than 75 percent of their students in 1971-72, six of the eight township schools bused more than 80 percent and two bused more than 90 percent. Speedway had no busing and Beech Grove bused 62 percent of its students in 1971-72. These statistics may cast doubt on the sincerity of groups

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Evans, Washington Township. *Id.* at 427; Robert D. Hartman, Carmel-Clay. *Id.* at 603; Hubert R. Haynes, Brownsburg. *Id.*, vol. V, at 997; Frank Hunter, Perry. *Id.*, vol. III, at 515; Charles O. Jordan, Pike Township. *Id.*, vol. II, at 337; Robert L. Mason, Franklin Township. *Id.*, vol. V, at 907; Bernard Keith McKenzie, Lawrence. *Id.*, vol. III, at 505; Pearson Miller, Mt. Vernon. *Id.*, vol. V, at 880; Wendell Peterson, Greenfield Central. *Id.*, vol. VI, at 1202; David Rankin, Avon. *Id.* at 1129; Harold R. Sharpe, Eagle Union. *Id.* at 1144-56; Sidney Spencer, Wayne Township. *Id.*, vol. V, at 859; Roger Sturm, Plainfield. *Id.*, vol. III, at 477; Austin Walker, Warren Township. *Id.* at 557-58; Dale Weller, Speedway. *Id.* at 539; and Edwin White, Decatur Township. *Id.*, vol. V, at 968.

which oppose busing, but they do not provide a basis for an interdistrict remedy.

The most significant evidence was the opinion testimony of the expert witnesses regarding the question of whether an IPS-only plan would cause IPS to resegregate by becoming all, or nearly all, black. As Judge Dillin pointed out in his opinion, the experts disagreed.[289] Two kinds of experts testified. Some of the experts were persons with academic credentials, usually in sociology or demography.[290] The other experts were community leaders or participants in social service activities in Indianapolis, whose expertise was based not on academic credentials, but on a working knowledge of Indianapolis and its people.[291] The expertise of this latter group of witness was strenuously challenged by the defendants, but in most cases the court permitted them to give opinions about demographic trends in Indianapolis.

The critical testimony of all of these witnesses was their opinion as to whether the IPS would continue to have a greater percentage of black students and their projections for the racial balance of IPS. Dr. Dan W. Dodson testified that straight-line projections of racial composition of metropolitan areas were (in 1973) no longer valid.[292] He testified that the trend of more blacks in the inner cities and whites fleeing to the suburbs was over. That trend, he testified, was caused by a migration of poor blacks from rural locations to the inner cities, an exodus of

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[289]Although they disagreed, the judge's opinion was that there was no viable IPS-only plan. 368 F. Supp. at 1198.

[290]The academic experts were Dr. Dan W. Dodson, Professor of Sociology, Southwestern University. Record, vol. XIV, at 2252; Dr. Charles A. Glatt, Professor, demographer and director of the Midwest Institute, a desegregation center at Ohio State University. *Id.*, vol. IV, at 729, 731-32; Dr. Clifford P. Hooker, Professor of Educational Administration, University of Minnesota. *Id.*, vol. XI, at 2077; Dr. John T. Liell, Professor of Sociology and a demographer, Indiana University-Purdue University at Indianapolis. *Id.*, vol. V, at 1013; Dr. Jane R. Mercer, Professor of Sociology, University of California at Riverside. *Id.*, vol. XII, at 2274; and Dr. Ernest van den Haag, Professor of Sociology and Psychology, New York University. *Id.* at 2216. Mercer and Dodson were called by the United States, Glatt and Liell by the intervening plaintiffs and Hooker and van den Haag testified for suburban schools.

[291]Witnesses in this group were Brenda Bowles, Director of Division of Equal Educational Opportunity, Indiana Department of Public Instruction. *Id.*, vol. I, at 19; Mr. Robert DeFrantz, Director, Communtiy Action against Poverty in Marion County and member of IPS Board 1968-1972. *Id.* at 147; Sam Jones, Executive Director, Indianapolis Urban League. *Id.*, vol. IV, at 699-700; Norman L. Morford, Deputy Director, Indiana Civil Rights Commission. *Id.*, vol. I, at 76; and Osma Spurlock, District Director, Equal Employment Opportunity Commission. *Id.*, vol. VI, at 1218.

[292]*Id.*, vol. XIV, at 2552-2613.

whites to the suburbs, and a birth rate which was significantly higher for blacks than for whites. Dr. Dodson testified that the migration to cities was about over and that the birth rate for both blacks and whites has been declining. Due to these changes, Dodson said, "We are in a completely different era, a different ballgame than three years ago."[293]

The only expert whose testimony had a demonstrable impact on Judge Dillin's holding was Dr. Charles A. Glatt.[294] At least some, perhaps all, of the defense attorneys believe that Judge Dillin accepted the testimony of Professor Glatt, and not the conflicting opinion of other experts, because the judge had his mind made up prior to the trial that on IPS-only plan would not be acceptable.[295]

Whether the issue truly was an open question or not, Professor Glatt's opinion prevailed over those of the other experts on the question of whether an IPS-only plan was acceptable. His opinion was that whenever a school or a school system exceeds 25 to 33 percent black students, the white flight will accelerate and the school or the system will resegregate to all or nearly all black students. For this reason, Dr. Glatt testified, IPS could not be effectively desegregated within its own boundaries.[296] He testified that white flight is a recognizable phenomenon in cities with or without a desegregation plan but that the process "speeds up evidently" in response to a desegregation plan.[297]

The defense cast doubt on Dr. Glatt's tipping point testimony by the fact, brought out on cross-examination, that as an IPS-retained consultant Glatt had once recommended parameters of 15 percent be established for IPS schools. Since IPS schools in 1973 had 40 percent black students, this would mean the schools, under Dr. Glatt's recommendation, could have from 25 to 55 percent black students. Judge Dillin apparently recognized that his earlier recommendation was made in the context of IPS only, where it would be impossible to bring the schools below the tipping point.

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[293]Direct exam, Dr. Dodson, July 5, 1973. *Id.* at 2582.

[294]Testimony, Dr. Glatt, June 18, 1973. *Id.*, vol. IV, at 729-854.

[295]Confidential personal interview.

[296]Professor Glatt testified:

> [T]he general professional view is that when a district or a particular school attendance area becomes somewhere between 25 to 33 percent black, that's when the white residents begin to panic and that's when a certain amount of movement out begins to increase. My professional judgment is, if any school district alone is involved in the desegregation, it will become an invitation to become an all-black or nearly all-black school city.

Direct exam, June 18, 1973. Record, vol. IV, at 759.

[297]*Id.*

Judge Dillin's impression of Dr. Glatt as a witness was vividly demonstrated in August of 1973 when he was named one of the two court commissioners appointed to prepare an interim plan for the court.[298]

Dr. Hooker testified on behalf of the suburban schools that an IPS-only plan was preferable to a metropolitan plan. He favored an IPS-only plan because larger school systems encounter more complex problems and are less effective educationally. Dr. Hooker testified an IPS-only plan would be a satisfactory remedy because white flight is "grossly overstated."[299] IPS would not, according to him, resegregate because the black migration is essentially over and because of a decline in the birth rate. Judge Dillin stated in his opinion that "the testimony of . . . Dr. Hooker, was completely demolished by cross-examination showing that in his published articles he had expressed views opposite to those given in this case . . . ."[300] Counsel for intervenors did cross-examine Dr. Hooker extensively from some of his 1968 publications, but some defense attorneys critically charge[301] that the cross-examination Judge Dillin was referring to in this sentence was in fact conducted by Judge Dillin.[302]

Dr. Liell, an Indianapolis resident and a demographer, testified it was his opinion that an IPS-only plan would result in

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[298]Order, Aug. 27, 1973, at 4.

[299]Direct exam, June 28, 1973. Record, vol. XI, at 2092.

[300]368 F. Supp. at 1199.

[301]Confidential personal interview.

[302]This charge is likely based on testimony in which Judge Dillin asked Dr. Hooker why, if white flight were a myth, the percentage of black students was increasing in IPS.

Dr. Hooker said, "It is generally a loss in birth rate. The white birth rate declined some seven years ago in Indianapolis. The black birth rate began to decline in this city in the last few years." Record, vol. XI, at 2134.

After the court asked for an explanation of the enrollment figures in the IPS high schools, the following exchange took place:

Witness Hooker:	There is a loss in white enrollment in the high schools in Indianapolis over the ten-year period.
The Court:	And that wouldn't be the birth rate, then, would it?
Witness Hooker:	No, it wouldn't.
The Court:	So where do you think they went—evaporated?
Witness Hooker:	No, sir.
The Court:	Where do you think they went?
Witness Hooker:	They may have gone to the suburbs, but I don't know if they did or not.
The Court:	Good guess!

Id. at 2134-35.

resegregation of IPS.[303] Dr. Liell's opinion was based on 1970 census data and demographic trends in Indianapolis.

Dr. Mercer testified that a desegragation plan would not encourage white flight.[304] She had done extensive work with the desegregation of schools in Riverside, California and was generally familiar with the desegregation activities in many California schools. Judge Dillin said that the Riverside experience contained factors irrelevant in Indianapolis. In Riverside minority students constituted less than 25 percent of the student population, the desegregation plan was voluntary, and implementation of the plan was accompanied by much community relation effort.[305]

Dr. van den Haag testified to the effect that integration does not reduce prejudice or promote racial harmony. Objections to his testimony were sustained and he was not permitted to testify.[306] The defendants also offered to present Dr. David J. Armor, who would have testified on the same issue. He was excluded.[307] The court of appeals upheld the exclusion of the evidence as an attempt to challenge the underpinnings of *Brown* I.[308]

D. The Decision

Judge Dillin held on July 20, 1973, that an IPS-only plan was not acceptable. He found that the tipping point factor applied to the IPS system as a whole and that "when the percentage of Negro pupils in a given school approaches 25% to 30%, more or less, in the area served by IPS, the white exodus from such a school district becomes accelerated and continues."[309] Judge Dillin stated that since on the whole IPS had more than 40 percent black students there were only two possible kinds of IPS-only plans. One would be to order all the schools desegregated with a racial composition of approximately 60 percent white and 40 percent black.[310] This is what the judge referred to in his earlier opinion as massive " 'fruit basket scrambling' "[311] which he said would not work because all of the schools in the system would be beyond the tipping point and the IPS system thus would resegregate by be-

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[303]Dr. Liell's testimony for June 19 and 20, 1973, is recorded at record, vol. V, at 1013-15 and vol. VI, at 1076-1128.

[304]Dr. Mercer's testimony of July 2, 1973, is recorded at record, vol. XII, at 2274-2352.

[305]368 F. Supp. at 1198-99.

[306]503 F.2d at 83-84.

[307]*Id.*

[308]*Id.*

[309]368 F. Supp. at 1197.

[310]*Id.* at 1198.

[311]332 F. Supp. at 678.

coming all black in a short period of time.[312] The other alternative would be to desegregate less than all of the IPS schools so that the desegregated schools were below the tipping point, leaving other schools all or predominately black.[313] Judge Dillin held that neither of these was a constitutionally permissible remedy.[314]

Having found an IPS-only plan was not acceptable, Judge Dillin held there was legal basis for an interdistrict remedy.[315] This conclusion was based primarily on the proposition that Indiana school corporations are the responsibility of the State of Indiana. Due to the Indiana Constitution,[316] IPS was an agent of the state and the unlawful acts of segregation of IPS were imputed to the state. Judge Dillin also held that because of the state's broad powers over the educational process, the state has an affirmative duty to act to eliminate unlawful segregation;[317] he found the state had "done almost literally nothing, and certainly next to nothing, to furnish leadership, guidance, and direction in this critical area."[318] The fact that education was a state function in Indiana distinguished the case in Judge Dillin's mind from the *Bradley v. School Board of City of Richmond*[319] decision. Instead of *Richmond* the judge relied on *Bradley v. Milliken*.[320] He held the educational process in Indiana was more comparable with Michigan's than with Virginia's.[321]

Judge Dillin found specific acts of de jure segregation on the part of the state provided further basis for an interdistrict remedy. In the 1971 opinion, he had held the location of two new IPS high schools, John Marshall High School and Northwest High School, in the outer reaches of the IPS district, as far removed as possible from the black community, resulted in the schools' opening as almost all-white high schools, while other IPS high schools were still all black.[322] The approval of these site selections, pursuant to state law, by the Indiana Department of Public Instruction constituted acts of de jure segregation. These acts were the basis for an interdistrict remedy because "the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts."[323]

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[312] 368 F. Supp. at 1198.
[313] *Id.*
[314] *Id.*
[315] *Id.* at 1205-06.
[316] IND. CONST. art. 8, § 1.
[317] 368 F. Supp. at 1199-1203.
[318] *Id.* at 1203.
[319] 462 F.2d 1058.
[320] 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).
[321] 368 F. Supp. at 1205.
[322] 332 F. Supp. at 669.
[323] 368 F. Supp. at 1205.

In the judgment of the attorneys for the suburban schools the most significant finding was that the suburban schools had not committed any acts of de jure segregation.[324] Judge Dillin did find the suburban schools were culpable in that they had unanimously opposed an effort to reorganize the schools in Marion County. The failure to obtain reorganization "froze all existing school corporations in Marion County according to their then existing 1961 boundaries."[325] The judge said, "It is apparent that confining IPS to its existing territory had the effect, which continues, of making it first difficult and now impossible to comply with the law requiring meaningful desegregation."[326] The opinion does not place reliance on this factor as a basis for imposing an interdistrict remedy. There was no ruling on the constitutionality of Uni-Gov.[327]

Judge Dillin did not impose a remedy in this opinion but instead provided the Indiana General Assembly "a reasonable time" in which to devise and implement a remedy.[328] The opinion leaves no doubt as to the alternative to legislative action: "If the General Assembly fails to act in the manner described within a reasonable time, this Court has the power and the duty to devise its own plan, and to order the defendant[s] . . . to implement the same."[329]

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[324]Judge Dillin said:

> There was no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders. In fact, the evidence shows that, with a few exceptions, none of the added defendants have had the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none . . . .

Id. at 1203.

[325]*Id.*

[326]*Id.* at 1204.

[327]In the only portion of the opinion which speaks to the intervening plaintiffs' prayer for a declaration that Uni-Gov is unconstitutional, Judge Dillin says:

> In the opinion of the Court such statutes, [the judge was referring to additional statutes] along with the application or the misapplication of the School Reorganization Act of 1959, certainly placed IPS in a straight jacket. However, in view of the Court's other findings and conclusions, it is unnecessary to consider the question of unconstitutionality.

Id. at 1208.

[328]No rational, politically aware person in the state of Indiana believed that the Indiana General Assembly would relieve Judge Dillin of this political hot potato, but Judge Dillin acquired some public support by giving the General Assembly one last chance to act. *Id.* at 1205.

[329]*Id.*

V. Interim Relief

A. The Orders

While awaiting the response of the General Assembly, Judge Dillin ordered what he called interim measures to be implemented prior to the beginning of the 1973-74 school year. He ordered black students transferred from IPS to each of the defendant suburban schools, both in Marion County and outside Marion County, in such numbers to equal 5 percent of the enrollment of each suburban school corporation.[330] The order excluded kindergarten students and high school seniors. In addition, Washington and Pike Townships, which already has measurable numbers of black students would receive fewer IPS transfers.[331]

The court ordered IPS internal desegregation efforts increased so that when school opened in the fall of 1973 each IPS elementary school would have a minimum black enrollment of 15 percent.[332] This was to be done by first pairing and clustering schools which were in close proximity. If, after utilizing these procedures the required 15 percent level was not reached, pairing and clustering of schools in "non-contiguous zones" was ordered.[333]

Judge Dillin ordered high school feeder patterns altered so that Howe High School, which had a black enrollment of about 6 percent, would have a black enrollment of about 25 percent, and Shortridge High School, which was predominantly black, would have a black student enrollment not more than 60 percent.[334] In adjusting these assignments, Judge Dillin reminded IPS that Arlington High School and Broad Ripple High School had then already passed the 40 percent black tipping point and black enrollments at these schools should be reduced if possible. No specific action was ordered with respect to these two high schools.[335]

Judge Dillin said that if transportation of pupils was required to effectuate the interim plan the transportation of students of the two races should be "generally proportionate."[336] Recognizing, however, that the burden of busing would not be proportionate,

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[330] *Id.* at 1209. This order is further evidence that the entire controversy might have been resolved in 1971 when IPS proposed to transfer 5 percent black students to each of the township schools.

[331] Washington Township, which had 11 percent black students in 1973, was ordered to receive black students from IPS equal to 1 percent of Washington's enrollment. Pike Township had 8 percent black students and was ordered to receive an additional 2 percent. 368 F. Supp. at 1209.

[332] *Id.*

[333] *Id.*

[334] *Id.* at 1209-10.

[335] *Id.* at 1210.

[336] *Id.* at 1209.

he qualified this requirement by stating that nothing in the order would prevent "IPS from closing obsolete, heavily black schools if no longer needed . . . [and that] in some cases, a disproportionate number of black students will require transportation."[337] All defendants were ordered to institute "appropriate in-service training courses for their respective faculties and staff, and otherwise to orient their thinking and those of their pupils toward alleviating the problems of segregation."[338]

B. The Response from Community Leaders

The public response to Judge Dillin's opinion was immediate and uniform in its opposition. Those people in Indianapolis who supported Judge Dillin kept their sentiments to themselves. The public response on this occasion was typical of the general public reaction to the judge's actions throughout the case.

The leaders of the black community were initially united in their disapproval of Judge Dillin's opinion, because of the decision to bus black students to the suburban schools without a reciprocal return of white students to the city schools. The Rev. Boniface Hardin, Director of Martin Center, a black culture organization said, "I think it is naive to think black parents will send their children out there. I'm very much afraid these children will be harmed, given the behavior pattern manifested at this time."[339] David Mitcham, president of the Indianapolis Chapter of the NAACP, denounced Judge Dillin's decision. Mitcham was quoted by the *Indianapolis News* as saying, "It shows us we haven't come a darn bit since the 1954 'separate-but-equal decision.' "[340] On July 31, 1973, however, Mitcham announced that the local Board of Directors of the NAACP had voted to support Judge Dillin's decision, and Mitcham said he supported the decision.[341]

The response from the white citizens in the suburbs was just as immediate and just as negative. The day after the opinion, Dan L. Burton announced that he was reactivating the organization called Citizens Against Busing and the group would begin circulating petitions.[342] The campaign to impeach Judge Dillin was intensified and a new paragraph was added to the petition. On August 25, 1973, Burton together with Marion County Circuit Court Judge John L. Niblack and two members of the Indiana General Assembly announced at a press conference that they were

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[337] *Id.*

[338] *Id.* at 1210.

[339] News, July 20, 1973, at 2, col. 3.

[340] *Id.*

[341] Star, Aug. 1, 1973, at 9, col. 3.

[342] News, July 23, 1973, at 24, col. 3.

beginning a drive to obtain signatures on petitions asking the Congress to impeach Judge Dillin for " 'unconstitutional, unlawful and dictatorial actions.' "[343] It was announced that Burton, Niblack, Rep. Robert Bales from Danville, Indiana, and State Senator Joan Gubbins, Indianapolis, all Republicans, were forming a new organization to be incorporated, called Committee To Impeach Judge Dillin. The *Indianapolis News* reported that three members of the IPS school board attended the news conference.[344]

Niblack, who had been Marion County Circuit Court Judge for over thirty years, said Dillin had " 'seized the reins of civil authority and deposed a duly elected and qualified school board of this state as effectively as Castro took power in Cuba, or Russia in Czechoslovakia without anymore legal warrant.' "[345] Niblack said that Dillin " 'has acted as chief advocate, judge, jury and executioner in the case, ordering new parties added to the case on his own motion . . . putting them to large expense of taxpayers' money to defend themselves.' "[346] The *Indianapolis News* reported that Niblack was asked at the news conference why he did not also call for the impeachment of the United States Court of Appeals for the Seventh Circuit, which had up to that time upheld all of Judge Dillin's decisions in the case. The article reported that Niblack responded, " '[b]ecause I didn't choose to. I'll say this about the 7th Circuit Court. I think it's a rotten court. They let the Chicago 7 and Kunstler go. Maybe they should be impeached.' "[347] Niblack added that he was concerned with the " 'oligarchy of Federal judges who have seized power in the U.S. without regard to the law.' "[348]

When a question was asked at the news conference whether Niblack was violating any canons of professional ethics by speaking out against another judge, Burton responded that "the answer would be up to the electorate to determine whether Niblack was right in speaking out in that Niblack's present six year term would expire on January 1, 1975."[349]

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[343]News, Aug. 25, 1973, at 1, col. 1.

[344]*Id.* The article reported that board members Paul Lewis, Lester Neal, and Fred Ratcliff attended the news conference.

[345]*Id.* Niblack was referring to the appointment of two court commissioners to prepare an interim desegregation plan. See text accompanying note 366 *infra.*

[346]*Id.*

[347]*Id.*

[348]*Id.*

[349]Star, Aug. 25, 1973, at 3, col. 4. Niblack was not reelected to the Marion County Circuit Court in 1974, but it is not believed the movement to impeach Judge Dillin had any significant impact on the election. At the 1974 election all of the incumbant state court judges in Marion County,

Two days after the press conference, Representative Bales was quoted as saying that Judge Dillin was, through his school desegregation orders, seeking to "establish legal credentials for a possible appointment to the United States Supreme Court."[350]

In what was to be the theme of the impeachment campaign, Niblack charged Dillin had "deliberately violated the 1964 Civil Rights Act passed by Congress which forbids discrimination against citizens and school children by race or color and which specifically forbids assigning school children or drawing of school districts to correct racial imbalance."[351]

The proposition asserted by Judge Niblack had been fully considered by the United States Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*.[352] Judge Niblack was either unaware of or unwilling to accept the Supreme Court's interpretation of the statutory language. In *Swann*, the Supreme Court very unambiguously said this language was designed to "foreclose any interpretation of the Act as expanding the *existing* powers of federal Courts to enforce the Equal Protection Clause."[353] The Court also said there was "no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers."[354]

C. The Stay

On August 8, 1973, Judge Dillin stayed those portions of the decision which required transportation of students outside IPS

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all Republicans, were defeated and the entire slate of Democratic candidates were elected.

[350]Star, Aug. 27, 1973, at 1, col. 1.

[351]*Id.* Judge Niblack was referring to Title IV of the Civil Rights Act of 1964.

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color religion, sex or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.
>
> . . . .
>
> [N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

42 U.S.C. § 2000c-6 (1970).

[352]402 U.S. 1 (1971).

[353]*Id.* at 17.

[354]*Id.*

for the 1973-74 school year.[355] He ordered IPS to file an interim plan for the upcoming year.[356] IPS was ordered to submit a plan in which no elementary school would have less than 15 percent black enrollment, which would reduce Shortridge High School to 60 percent black, and which would make Thomas C. Howe High School about 25 percent black, instead of the predicted 6 percent black.[359]

On August 14, 1973, the IPS Board submitted a plan to the court which did not satisfy any of these criteria. The IPS plan left 15 elementary schools with less than 15 percent black enrollment[360] and did not satisfy the standard established for the 2 high schools.[361] Judge Dillin held a hearing on August 20, 1973, to hear evidence on the IPS plan. After hearing testimony for several hours, Judge Dillin ruled from the bench that the plan was not in compliance with the order of July 20, 1973.[362]

Judge Dillin said the IPS plan was rejected not only because none of the three requirements had been satisfied, but also because

> [m]ost importantly, the plan is in complete disregard of the Court's order of July 20, 1973 as to method of desegregating the elementary schools. That order, agreeable to the policy of the Supreme Court of the United States as enunciated in *Swann v. Charlotte-Mecklenburg Board of Education*, required the Board to give first consideration to the changing of attendance zones, and to such devices as pairing and clustering before giving consideration to transportation of pupils. The Board's plan does not provide for the use of any of these Supreme Court approved devices.[363]

To emphasize this point, the judge pointed out one instance in which an IPS elementary school was 40 percent black and a contiguous school was less than 5 percent black.[364] Instead of pairing the two, as the July 20, 1973, order required, the plan proposed by IPS left these two schools as they were.[365]

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[355]368 F. Supp. at 1224.
[356]*Id.* at 1208.
[357]*Id.* at 1209.
[358]*Id.* at 1210.
[359]*Id.*
[360]Direct exam, Joseph C. Payne, Aug. 20, 1973. Record at 51.
[361]Opening statement, Mr. McTurnan, Aug. 20, 1973. Record at 5.
[362]A written order was released on August 27, 1973.
[363]Order, August 27, 1973 at 2.
[364]Aug. 20, 1973. Record at 122. (Schools 104 & 65).
[365]*Id.* Judge Dillin's sentiments on the entire case were as follows: [N]ever, since this thing started on the complaint of the United States in 1968 . . . has any [IPS] Board . . . gone very far to do

D. The Appointment of Commissioners

Having found IPS in default of the July 20, 1973, order, Judge Dillin appointed two court commissioners[366] to formulate both an interim plan for the 1973-74 school year and a final plan. The commissioners appointed were Dr. Joseph T. Taylor and Dr. Charles A. Glatt.[367] IPS was directed to cooperate fully with the commissioners, to provide them space at the Education Center (the IPS Administration Building) to pay all their fees and expenses, and to provide office support. The commissioners were to have full access to the maps, drawings, reports, statistics, computer studies and all information about the school system which they needed in their preparation of a plan. Judge Dillin specifically ordered that

> until such time as the Commissioners may have completed their assigned tasks to the satisfaction of the Court, the defendants are ordered and directed to assign their professional planning staff wholly to the services of the Commissioners, except as Commissioners or the Court may otherwise permit or direct.[368]

Finally, Judge Dillin ordered IPS to formally apply to the United States Department of Health, Education and Welfare for funding, under Title VII of the Civil Rights Act of 1964, for a comprehensive human relations program.[369] The judge said, "little bitty school systems that I never heard of . . . are collecting, in some instances, over a million dollars a year for this type of thing."[370] No action of Judge Dillin has created more animosity with the IPS Board than the order to apply for federal funds. At a special board meeting on August 21, 1973, the IPS Board voted to apply for the federal funds as ordered by the court. Four of the

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> anything, really, unless they were pushed and ordered. And then when they were ordered, they usually . . . come up with an alternate idea that doesn't go quite as far as the order, or you want a stay or something — any thing to put it off.

Record at 117 (Aug. 20, 1973).

[366]Order, August 27, 1973, at 4. The appointment of two court commissioners was proposed in a motion to the court by the intervening plaintiffs Buckley on August 15, 1973. Record at 109.

[367]Dr. Taylor was the Dean of the School of Liberal Arts, Indiana University, Purdue University at Indianapolis. Dr. Glatt was Professor of Education and Director of a desegregation center at Ohio State University. Dr. Glatt had done consulting work for IPS and was a witness at the 1973 remedy trial. See, *e.g.*, Aug. 20, 1973, Record at 129-30.

[368]Order, August 27, 1973 at 4-5.

[369]*Id.* at 6.

[370]Aug. 20, 1973. Record at 126. Judge Dillin was berating IPS for complaining of the cost to desegregate while not applying for federal funds to provide for the cost.

members of the board read a public statement which said that they were voting to apply for the funds only because of the court order and that they still disapproved of accepting federal funds.[371] The board members felt so strongly about this issue they literally took it all the way to the Supreme Court. After the order to apply for the funds was affirmed by the court of appeals,[372] IPS unsuccessfully sought a writ of certiorari from the United States Supreme Court.[373] The initial IPS application for the Title VII funds was not a sincere effort by IPS and funding was denied. Judge Dillin declined to hold the defendants in contempt because of the defective application. Instead he ordered IPS to reapply for the federal funds and the funds were ultimately received.

In what a court of appeals opinion later described a "herculean task within a miniscule period of time,"[374] the commissioners were asked to formulate a desegregation plan which would be implemented when school started 15 days later. When the commissioners were appointed, there were 44 elementary schools in IPS which were at least 90 percent black. Although they were not strictly bound to do so, the commissioners used the guidelines which Judge Dillin imposed on the IPS Board in the July 20th decision.[375] The commissioners resolved that the interim plan should be one which could be expanded into a final plan without further reassigning those children affected by the interim plan. The commissioners made the assumption or the decision that in the final plan the black children attending the schools in the innermost core of the city would be transported to suburban schools. The interim plan paired and clustered the peripheral black schools with white in outlying areas of IPS. Under the interim plan 19 all-black schools remained in the center core of the city.

Despite the fact the IPS Board had vigorously resisted the court's desegregation efforts and had, in Judge Dillin's judgment, not done anything until they were forced to, the IPS staff had done considerable planning. Without this planning the commissioners would not have been able to prepare a plan in the small amount of time available. Following some initial difficulties (such as the commissioners not being provided a telephone because the court had not ordered that they be given a telephone), the commissioners established a bearable working relationship with

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[371]Star, Aug. 22, 1973, at 52, col. 3. Board members Lester Neal, Carl J. Meyer, Constance Valdez, and Paul E. Lewis said they voted yes "only because of the Court order since they disapprove of accepting federal funds."

[372]503 F.2d at 78.

[373]Bowen v. United States, 421 U.S. 929 (1975).

[374]503 F.2d at 77.

[375]368 F.Supp. at 1206-08.

the IPS staff. The commissioners found that the staff personnel "had more faith in the law prevailing than did the board members."[376]

The IPS Board was consistently hostile to the commissioners, seemingly holding the commissioners personally responsible for their intrusion. During the time the commissioners were preparing a plan, the IPS Board met frequently, perhaps daily, to quiz staff members about the commissioners' activities.[377] The only meeting of the commissioners and the IPS Board took place when the commissioners presented the interim plan to the board the night before presenting it to Judge Dillin. At the meeting, the members of the IPS Board demonstrated very strong, emotional, personal resentment of the commissioners.[378]

When the commissioners' plan was presented to Judge Dillin on August 30, 1973, the defendants asked that the kindergarten and high school pupils be excluded from the plan. IPS wanted kindergarten students excluded so as not to require busing of the youngest children. They wanted to exclude the high schools from the interim plan because they believed the potential for violence and disorder increased as the age of the students increased. The commissioners accepted these alterations and they were approved by Judge Dillin. The plan, as approved by Judge Dillin, called for the reassignment of 9,300 students, 80 percent of whom would be bused.

IPS Board members, apparently in reliance on their continuing efforts to obtain a stay, had not made any arrangements to obtain buses. They pleaded with Judge Dillin that they could not possibly institute the plan when school opened on September 4 because they did not have the transportation facilities. Judge Dillin permitted school to open as planned but ordered that all reassignments of the interim plan be effectuated within about six weeks. The first reassignments were made on September 17, 1973.

The delay of the reassignments until after school opened resulted in some advantages as well as the obvious disadvantages. The biggest disadvantage was that students started school in one building and were then within 6 weeks assigned to another class in another building. This created a great deal of uncertainty and anxiety for the parents and resulted in a great deal of unnecessary turmoil. On the other hand, IPS administrators be-

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[376]Confidential personal interview.

[377]The commissioners believed some of the IPS board members were leaking this information to the press. *Id.*

[378]*Id.*

lieve the interim plan was efficiently and effectively conducted because they were given an opportunity to implement the plan in phases.[379]

The 9,300 student reassignments were divided into 8 phases for the initial transfer. All 8 phases were implemented in the first 6 weeks of school. As part of the implementatiin of the interim plan, IPS made a last-minute effort to prepare school personnel and parents for the reassignments. An administrator from central administration was individually assigned to each school to assist in the transfers. Switchboard operators at the education center were advised of these assignments and incoming calls were referred accordingly. Each newly assigned student was assigned a buddy at his new assigned school, and IPS attempted to send a personalized letter to each parent involved. In at least one white school,[380] the principal and the parents worked very hard to make the incoming black students feel wanted. Some public demonstrations were conducted, never more than 300 people reportedly participating,[381] and there were some rumors of school boycotts, but neither action had any significant effect. Within a few days after all transfers had been completed, enrollments were reported to be normal and the public outcry had dissolved.[382]

IPS, even while implementing the interim plan, continued its efforts to obtain a stay. On September 15, 1973, the board received word that Justice Rehnquist had denied its motion.[383] Justice Rehnquist dangled some bait for IPS, however, saying the stay was denied because Judge Dillin had not had full opportunity to rule on the issues raised by IPS.[384] On October 9, during implementation of the interim plan, IPS again petitioned Judge Dillin for a stay. The motion was denied and IPS again petitioned Justice Rehnquist for a stay. This petition was denied.

VI. Aftermath of the Interdistrict Remedy Order

A. The Response of the Indiana General Assembly

The Indiana General Assembly met in November of 1973 to organize itself for a session which would convene in January of 1974. The early indications from the public statements of the Governor and the legislative leaders were that the General As-

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[379] *Id.*

[380] IPS School 84.

[381] *See e.g.*, News, Sept. 13, 1973, at 24, col. 4; News, Sept. 14, 1973, at 4, col. 3.

[382] News, Sept. 18, 1973, at 2, col. 1.

[383] Star, Sept. 15, 1973, at 1, col. 1.

[384] *Id.*

sembly would not accept Judge Dillin's invitation to devise a desegregation plan for metropolitan Indianapolis.[385] The most commonly stated reason was that the problem was of local and not state concern. The issue was simply too hot to handle politically and the Republican-controlled General Assembly was not anxious to extricate Judge Dillin from the case. In an effort to encourage the General Assembly to act, Judge Dillin issued, on December 6, 1973, a supplemental memorandum of decision.[386] In this opinion Judge Dillin elaborated on the reasoning for his decision that the General Assembly had a duty to provide a metropolitan plan.[387] He also specified the length of time he was willing to wait for the state to act[388] and provided the General Assembly guidelines for a plan.[389]

Judge Dillin also vacated the orders contained in the July 20, 1973, opinion which required transfer of students to the suburban schools on an interim basis.[390] This order had previously been stayed. Judge Dillin said he did not want the orders to be an impediment to legislative action.[391]

Judge Dillin's opinion that the General Assembly had a duty to devise a plan to dismantle the dual school system in IPS[392] was based on the constitutional oath taken by members of the General Assembly,[393] the principles of *Brown* I and *Brown* II, and the supremacy clause of the United States Constitution.[394]

As possible alternatives Judge Dillin suggested the General Assembly could combine all the school districts in the metropolitan Indianapolis area into a single metropolitan school district; it could replace the present 24 school districts with 6 or 8 new school districts; or it could provide for an exchange of pupils within the existing school corporations.[395] Judge Dillin advised the General Assembly that one-way busing of black students to the suburban schools would not be acceptable unless there were "compelling reasons" to support such an approach. He suggested a compelling reason might be the closing of some of the old unsatisfactory school buildings in the Indianapolis inner city.[396] The

[385] *See e.g.*, News, Dec. 8, 1973, at 21, col. 5.
[386] 368 F. Supp. at 1223.
[387] *Id.* at 1224-27.
[388] *Id.* at 1224.
[389] *Id.* at 1227-28.
[390] *Id.* at 1231.
[391] *Id.*
[392] *Id.* at 1224-25.
[393] U.S. CONST. art. VI, § 3.
[394] U.S. CONST. art. VI, § 2.
[395] 368 F. Supp. at 1227-28.
[396] *Id.*

opinion stated that "the Court considers a reasonable time within which the General Assembly should act to be the end of its January, 1974 session or February 15, 1974, whichever date is sooner."[397]

The Indiana General Assembly did not accept the directive. Not only was no metropolitan plan forthcoming from the General Assembly, none was introduced and there was very little public discussion of the issue during the session. The only legislation enacted which was applicable to the case was Senate Enrolled Act 119, a statute which "provides for the adjustment of tuition among transferor and transferee schools and for the reimbursement of transportation costs by the state and is rigidly limited in its application . . . ."[398]

On the same day the supplemental opinion was announced, December 6, 1973, Judge Dillin relieved the commissioners of the task of preparing a final plan for the desegregation of IPS.[399] The IPS planning staff was released to the complete control of the board and the IPS board was ordered to prepare a plan for the desegregation of IPS on an interdistrict basis. This plan was to be available as a contingency plan in the event the General Assembly failed to act. Judge Dillin subsequently ordered IPS to pay Dr. Glatt $29,925 and Dr. Taylor $13,950 for their services as commissioners.[400]

In January of 1974 the IPS staff prepared a proposed metropolitan plan as ordered by the court.[401] On February 12, 1974, the IPS Board voted five to two not to approve the plan but to permit the plan to be submitted to the court in accordance with the court's order.[402] The plan proposed the closing of most of the remaining all-black IPS schools and the closing of some biracial schools in stable integrated neighborhoods. Some of these schools were relatively new and others had been extensively remodeled in recent years.

On March 21, 1974, the appellate courts had still not approved an interdistrict remedy so Judge Dillin ordered IPS to

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[397]*Id.* at 1224.

[398]*See* 503 F.2d at 74.

[399]Entry, Dec. 6, 1973. Record at 1.

[400]In addition to the compensation for the commissioners IPS was required to pay $5,000 in attorneys' fees for John O. Moss and John Preston Ward for legal services the two attorneys performed for the commissioners in defending an action brought against the commissioners in an Indiana state court.

[401]Phase II—Metro Plan (Indianapolis III). Submitted to the Board of School Commissioners, February 12, 1974.

[402]Confidential personal interview.

submit three IPS-only contingency plans. IPS responded by filing the Area Pyramid Plan with two minor variations thereof as the three plans.[403] IPS also prepared and submitted to the court a fourth plan which was advertised by IPS Board members as being based on plans proposed in Memphis and Knoxville. This latter IPS plan would have left a number of IPS elementary schools predominantly black and contemplated much less integration than Judge Dillin had consistently indicated would be required.

When the appeals from the Indianapolis case and the Detroit case had not yet been resolved in July of 1974, Judge Dillin entered an order staying the interdistrict transfers for the 1974-75 school year. The interim plan was ordered continued for another year with only minor adjustments.

B. Two Proposed Interventions

Since Judge Dillin's ordering of an interdistrict remedy relied on *Milliken*, it was inevitable that the Indianapolis case would continue to track this Detroit case. The Seventh Circuit heard oral arguments on appeals in the Indianapolis case on February 20, 1974;[404] one week later the United States Supreme Court heard oral arguments in the Detroit case.[405]

Most interested people in Indianapolis believed the Seventh Circuit would not decide the appeals from Judge Dillin's 1973 decision until the Supreme Court had ruled on the Detroit case. From the end of February 1974 through the spring of 1974 it was generally believed that decisions in the two cases would be forthcoming at any time and that the final desegregation plan would be put into effect in the fall of 1974. In anticipation of the appellate decision in the two pending cases and the expected final plan, two groups petitioned to intervene as parties to the case so they might have a voice in the formulation of the final plan.

On April 19, 1974, the Indiana State Teachers Association (ISTA) moved to intervene as a plaintiff.[406] At the time ISTA sought to intervene, IPS was withholding contracts for the 1974-75 school year from all probationary teachers pending a resolution by the court of appeals of the interdistrict remedy issue. IPS stated

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[403]Plans for desegregation of Indianapolis Public Schools; submitted to the Board of School Commissioners, Indianapolis Public Schools, April 30, 1974.

[404]503 F.2d at 68.

[405]418 U.S. at 717.

[406]Petition of ISTA for Further Relief, IP 68-C-225, April 19, 1974.

that it would need as many as 1,000 fewer teachers[407] if a desegregation plan involving a one-way transfer of students out of IPS was implemented. ISTA alleged in its petition to intervene that it was an affiliate of the National Education Association with local affiliates throughout the state of Indiana. One local affiliates is the Indianapolis Education Association, whose membership consists of more than 1,800 teachers employed by IPS.[408]

The petition raised several objections to the metropolitan plan submitted to the court by IPS on March 8, 1974. ISTA complained that the plan was obviously incomplete in that it was

> limited to demographic factors and contains nothing pertaining to the impact of desegregation, such as curriculum development, guidance and other programs for minority children making the transition, assistance to teachers and other school personnel in dealing with issues incident to desegregation.[409]

The petition also alleged the plan was

> further deficient in that it contains no data whatever concerning teacher displacement, and no indiciation whether or not displaced teachers, if any, could or would be absorbed elsewhere in the desegregation area, either in Indianapolis or the suburban schools.[410]

IPS was faced with a dilemma. The deadline, in the spring of 1974, for either rehiring or dismissing non-tenured teachers appeared likely to pass before the court of appeals ruled on the propriety of a metropolitan desegregation plan. Since the decision of the court of appeals could affect the total IPS enrollment by about 10,000 students, IPS did not know how many teachers it would need in the fall of 1974. The approach it chose for resolving this dilemma was to dismiss all non-tenured teachers and later rehire as many as were needed.

ISTA alleged that this approach, "wholesale dismissal to be followed by selective re-hiring pursuant to new applications,"[411] was not in accord with the procedure for staff reduction required

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[407]IPS announced on April 10, 1974, that the contracts of all probationary teachers would not be renewed. IPS further announced that those probationary teachers who wished to be considered for reemployment could apply after May 1, 1974. News, Apr. 11, 1974, at 1, col. 3.

[408]ISTA petition, *supra* note 406, at 1.

[409]*Id.* at 2.

[410]*Id.*

[411]*Id.* at 3.

in desegregation cases such as *Singleton v. Jackson Municipal Separate School District.*[412] ISTA also contended the approach taken by IPS was contrary to the provision in Judge Dillin's opinion of July 20, 1973, that

> [i]f any teachers presently employed by IPS are rendered surplus as a result of this order, and additional teachers are needed by any added defendant as a result hereof, first consideration shall be given by such added defendant to employing a qualified IPS teacher.[413]

ISTA prayed for an opportunity to participate in the formulaiton of a comprehensive plan covering all aspects of desegregation impact. ISTA asked that IPS be ordered to prepare such a comprehensive plan, and that the court "[e]njoin defendant Board of School Commissioners of the City of Indianapolis to reinstate all teachers who have been notified of non-renewal of contract for the 1974-75 school year . . . pending the approval by this Court of a comprehensive Desegregation Impact Plan . . . ."[414] Finally ISTA requested the court to require all school corporation defendants to

> offer contracts for the 1974-75 school year to all teachers on the same terms and conditions as such contracts would have been offered if no desegregation order had been pending, subject, however, to the right of the school corporation to terminate or change such contracts pursuant to a comprehensive Desegregation Impact Plan approved by this Court.[415]

After an extended period of uncertainty all IPS probationary teachers were hired for the 1974-75 school year. The ISTA petition to intervene was not granted during this critical period of time. The ISTA petition was not ruled on by Judge Dillin for almost a year. On the first day of the second remedy trial, March 17, 1975, the judge denied the ISTA petition in an oral ruling from the bench.[416] ISTA was subsequently granted leave to intervene by Judge William E. Steckler on August 8, 1975. Judge Steckler, the Chief Judge of the Southern District of Indiana, ruled on the renewed ISTA petition to intervene in the absence of Judge Dillin, who was on vacation.

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[412] 419 F.2d 1211 (5th Cir. 1969).

[413] 368 F. Supp. at 1209.

[414] ISTA petition, *supra* note 406, at 5.

[415] *Id.* at 5-6.

[416] March 18, 1975, record, vol. I at 2. Judge Dillin did, however, state that there may be reason to intervene in the future.

The Community Coalition for Schools, a group organized by northside Indianapolis neighborhood associations, sought to intervene through a motion to intervene filed by this writer as counsel for the group on June 10, 1974.[417] The neighborhood associations coalesced around the fact that the metropolitan plan filed by IPS contemplated closing all schools on the northside of Indianapolis as far north as 49th Street. The metropolitan plan proposed to close 19 predominantly black schools and several integrated schools all in the north central part of Indianapolis. The proposed intervenors sought to protect educational, environmental, social, recreational, and financial interests of the residents which would be directly affected by the final desegregation plan.

The coalition, which consisted of representatives from each of the neighborhood associations, representatives from other organizations, and interested individuals, promulgated guidelines which it asked the court to follow in considering approval of any final desegregation plan. Since the rallying point of the coalition was the potential school closings, the principal thrust of the intervention was to pray that any plan should provide for retaining schools wherever the physical facilities were adequate for an ongoing education program. If it were necessary to close schools, it was submitted that schools should be closed because of deficient physical facilities.

The coalition opposed one-way busing, an issue very directly related to the closing of schools. As long as a substantial number of IPS students were to be transported to other school corporations, and none returned to IPS, it was inevitable that some IPS schools would be closed. The motion prayed that

> [t]he plan should assure that both the benefits and burdens of desegregation are shared by all children and parents and all neighborhoods affected by the plan in a manner which is fair and equitable and which does not arbitrarily impose the burdens of transportation and adjustment to new school environments solely upon particular neigh-

[417]The neighborhood associations responsible for the creation of the coalition were the Butler Tarkington Neighborhood Association, Inc., United Northwest Area, Inc., Meridian Kessler Neighborhood Association, Inc., Forest Manor Neighborhood Association, Mapleton Fall Creek Neighborhood Association, Inc. Ultimately other organizations and individuals became active in the coalition. The motion to intervene was filed in the name of four of the neighborhood associations (Meridian Kessler joined in the motion one week later, Motion to Join Motion to Intervene), and nine individual parents, acting individually and on behalf of their nine children who attended IPS schools. Motion to Intervene, June 10, 1974, IP 68-C-225.

> borhoods within the total planned area or upon a particular racial or social-economic group.[418]

The proposed intervenors prayed that the court, in evaluating a desegregation plan, should be concerned with the total educational program of the affected students. The coalition asked that students

> reassigned to new schools outside their neighborhood are provided an educational environment and programs in their new schools which are equal or superior to the educational environment and programs in the schools which they previously attended, with respect to class size, curriculum, teacher and staff qualification and experience, teacher aides and other auxiliary personnel, school facilities, books and other teaching materials and supplies, extra curricular programs and activities and all other aspects of a complete educational program.[419]

The coalition submitted that the plan should require all affected schools to make provisions for human relations programs and other teacher and staff training designed to "assure a receptive and friendly environment for transfer of pupils in their new schools . . . ."[420] This action had previously been ordered by Judge Dillin, but the extent of compliance was unknown.

The coalition urged that the final desegregation plan should to the greatest extent possible continue student reassignments of the 1973-74 interim desegregation plan.[421] It was suggested that those students who had once been reassigned should not again be disturbed unless it was absolutely necessary. The IPS-proposed metropolitan plan completely ignored the interim plan and would have resulted in a second reassignment for most of the students included in the interim plan.[422]

The coalition proposed that whenever possible the reassignments of children of a specific neighborhood be treated equitably.

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[418]Intervening Plaintiffs' Claim for Intervention, June 10, 1974, at 2.

[419]*Id.* at 2-3.

[420]*Id.* at 3.

[421]*Id.*

[422]One of the individual intervenors was a white mother who had very vocally opposed having her daughter bused to a previously all-black school under the interim plan. This same mother was now very strongly opposed to having her daughter reassigned again. In less than one year the family had developed a strong identification with the new school and were just as upset about having their daughter transferred out of this school as they were about having her transferred out of her neighborhood school in the fall of 1973.

The interim plan, and other plans proposed by IPS, paired and clustered schools by assigning a portion of each school's district to a different school. The coalition of neighborhood associations objected to this practice on the grounds that it did not fairly and equitably spread the burdens of school desegregation. It was believed the method would unevenly affect property values. The members of the neighborhood associations were convinced that under this approach the value of residential property in that portion of the district assigned to the neighborhood school would be significantly higher than comparable property in that portion of the district assigned to a paired or clustered school in another part of the county.

As an alternative the coalition submitted that when schools were paired or clustered, the grades should be split among the schools so that all students would be bused out of their neighborhoods during some elementary years, but no child would be bused out all the time.[423]

The coalition contended the final plan should not permanently reassign children on the basis of race so that all of the black students in a neighborhood would go to one school while all the white students would go to another. The neighborhood associations asked the court to appoint an advisory committee "representing all racial, economic, and geographic interests of the City of Indianapolis to study all proposed plans and advise the court before adoption of the final plan . . . ."[424] They also asked the court to name, at the time the final plan was ordered, a "Biracial Committee to assist the court in monitoring the operation of the plan."[425]

None of the parties to the desegregation case opposed the motion to intervene on its merits. At the December 2, 1974, pretrial conference, IPS attorneys orally opposed the motion on the grounds that it was premature in that the court was not yet ready to consider a final plan. The motion was not ruled upon until March 17, 1975, the first day of the second remedy trial when

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[423]For example, under the coalition suggested approach, if School 1 was to be paired with School 2, all students in grades 1-4 would go to School 1 and all those in grades 5-8 would go to School 2. The usual IPS method is that both Schools 1 and 2 would remain 1-8 schools. IPS would permanently assign all students from a designated geographic portion of the School 1 district to go to School 2 in exchange for all students from a certain designated geographic portion of the School 2 district, who would be permanently assigned to School 1. IPS objects to the coalition approach because it can result in children in the same family attending different schools.

[424]Intervening Plaintiff's Claim for Intervention, *supra* note 418, at 5.

[425]*Id.* at 6.

Judge Dillin orally denied the motion from the bench. The coalition has continued its efforts to intervene but has not as yet been successful.

C. The 1974 Appellate Court Decisions

The Supreme Court announced its decision in the Detroit case, *Milliken v. Bradley*,[426] on July 25, 1974. The Supreme Court's decision was followed a month later by the decision of the Seventh Circuit on the appeals taken from Judge Dillin's 1973 opinion.[427] The decision of the court of appeals did not completely resolve the multidistrict remedy issues involved in the desegregation of IPS schools. The Seventh Circuit held, on the basis of *Milliken*, that the school corporations outside Marion County could not be included in the desegregation. The court said:

> In the present case based upon the district court's comprehensive and detailed recital of the history of Indiana law and procedure pertaining to Indiana schools, . . . we conclude, as the district court did, that the state officials have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries . . . .
>
> On the other hand, the district court's findings, rulings, orders and discussion relating to a metropolitan remedy beyond the Uni-Gov boundaries are reversed. Those relating to a metropolitan remedy within Uni-Gov are vacated and remanded . . . .[428]

The court of appeals ordered dismissal of the case against the school corporations located outside Marion County, and remanded the case to Judge Dillin for "further proceedings" to determine whether an interdistrict remedy could be ordered against the school corporations inside Marion County. This conclusion was necessary because Judge Dillin had reversed his ruling on the issue of whether Uni-Gov could be the basis for an interdistrict remedy extending to the Marion County line. In vacating the court's opinion, the Seventh Circuit said "[t]he district court should determine whether the establishment of the Uni-Gov boun-

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[426] 418 U.S. 717 (1974).

[427] 503 F.2d at 68.

[428] *Id.* at 80.

daries without a like reestablishment of IPS boundaries warranted an interdistrict remedy within Uni-Gov in accordance with *Milliken*."[429] The court of appeals framed the issues for the further proceedings by footnoting this sentence with that portion of Mr. Justice Stewart's concurring opinion from *Milliken* which said,

> Were it to be shown . . . that state officials had contributed to the separation of the races by drawing or redrawing school district lines . . .; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate.[430]

The Seventh Circuit also ruled on several less central issues. IPS had appealed from Judge Dillin's August 30, 1973, orders, which held the IPS Board in default for not submitting an acceptable plan, appointed the commissioners to prepare the interim plan, assigned IPS staff to the commissioners, and ordered IPS to apply for federal funds. The Seventh Circuit affirmed Judge Dillin with respect to all four of these issues in a brief section of the opinion.[431] The court of appeals refused to order that Judge Dillin be excused, pursuant to the petition of the state officials, on the grounds that he had, in a newspaper interview, evidenced a prejudgment of liability on the part of the defendants. The Seventh Circuit found that the judge's statements were based on the record of initial trial and were thus derived from proceedings before the court, not on attitudes formed outside the courtroom.[432]

The court of appeals rejected a position raised by the state officials and by the Metropolitan School District of Perry Township Schools that the eleventh amendment barred prosecution of the action " 'in essence against the State of Indiana without the State's consent or waiver of consent.' "[433] The court of appeals said simply "[t]he Eleventh Amendment does not prevent enforcement of the Fourteenth Amendment, which commands that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' "[434]

The defendant state officials and IPS, along with some of the Marion County suburban schools, petitioned the United States

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[429] *Id.* at 86 [footnotes omitted].
[430] *Id.* at 86 n.23, *quoting from* 418 U.S. at 755.
[431] 503 F.2d at 75-78.
[432] *Id.* at 80-81.
[433] *Id.* at 82 [footnote omitted].
[434] *Id.* at 82.

Supreme Court for a writ of certiorari to review the court of appeals' decision. Each of these groups of defendants was reacting to a different portion of the decision. IPS was appealing the court of appeals' judgment that IPS had been in default in presenting plans as ordered by the court and that Judge Dillin was justified in appointing the commissioners. IPS also sought certiorari on the order that it apply for federal funds. The state officials—the Governor, the Attorney General and the Superintendent of the Department of Public Instruction—appealed that portion of the judgment in which the Seventh Circuit affirmed Judge Dillin's findings that the state had been guilty of acts of unlawful segregation. The Marion County suburban schools appealed that portion of the decision which ordered further proceedings to be held to determine whether there was a basis for an interdistrict remedy which would include them. Their position was that on the basis of *Milliken,* all suburban schools should have been dismissed from the case, not just the non-Marion County suburban schools. The Supreme Court denied certiorari on all of these petitions.[435]

Following the decision of the Seventh Circuit, the state officials, IPS, and some of the Marion County suburban schools filed a motion with Judge Steckler, the Chief Judge of the Southern District of Indiana, asking that a new judge be appointed to hear the case on remand. The motion was made pursuant to rule 23, Local Rules of the United States Court of Appeals for the Seventh Circuit.[436] Judge Steckler referred the motion to the Seventh Circuit for instruction. On November 14, 1974, the court of appeals denied the motion to have a new judge appointed to the case.

VII. The Second Remedy Trial

A. *Pretrial Conference*

Judge Dillin held a pretrial conference with the lawyers on December 2, 1974. At this conference, Judge Dillin stated a trial would be held to permit all parties to present additional evidence on the issues of whether Uni-Gov, zoning laws, or location of public housing projects by governmental agencies in Marion County con-

[435] 421 U.S. 929 (1975).

[436] 7th Cir. R. 23 provides:

Whenever a case tried in a district court is hereafter remanded by this court for a new trial, it shall be reassigned by the district court for trial before a judge other than the judge who heard the prior trial unless the remand order directs or all parties request that the same judge retry the case.

stituted a basis for imposing a multidistrict remedy within the county.[437]

Judge Dillin continued his efforts to persuade the parties to settle the case. He related that the suburban schools, in his judgment, had said throughout that they were resisting inclusion in the case because they wanted to maintain local autonomy; they did not want their students bused into the city because the inner-city schools were inferior, but they were not opposed to integrated schools. In response to this position Judge Dillin said, "I have consistently pointed out that if suburban schools would accept 15% new minority students from IPS this would solve the problem, preserve their local autonomy and end this case."[438] The judge said, "It appears that the suburban schools want to hang out on an all or nothing basis."[439] He continued, "If you want to shoot dice with this court, the Seventh Circuit and the Supreme Court, this is your prerogative, but if you wake up some morning and find you are out of existence it is your problem and not mine."[440]

This last statement was a reference to the two possible concepts discussed by Judge Dillin at this pretrial conference.[441] The judge said that among the possible solutions would be for the court to either create a single school district for the entire county or to dissolve the IPS corporation and distribute its territory to the township school corporations. The presence of these two alternatives would seem to have given both IPS and the suburban schools some incentive to consider a settlement. With a single metropolitan district, all of the suburban schools would be eliminated; under the other alternative, IPS would be eliminated.

The desire to obtain a settlement had been consistently pursued by the judge throughout the case and the proposals made at this pretrial conference were not new. They had been made as early as 1971, but had been consistently rejected. In light of the facts that the Supreme Court had just severely restricted the availability of an interdistrict remedy and the Seventh Circuit had set aside such a remedy in this case, at this pretrial conference the suburban schools had a new surge of confidence. The tide had very definitely turned.

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[437]This author attended the pretrial conference on December 2, 1974, as counsel for the community coalition for schools.

[438]Quotation is taken from the writer's personal notes of the pretrial conference.

[439]*Id.*

[440]*Id.*

[441]These two ideas had been suggested to the Indiana General Assembly as possible solutions in Judge Dillin's opinion of December 6, 1974. 368 F. Supp. at 1227.

One of the lawyers for a suburban school told Judge Dillin the suburban schools were hesitant to accept one-way transfers because of their fear of the court continuing its jurisdiction over the schools to supervise the remedy. This is a sentiment which has been repeatedly voiced in the suburban areas. Judge Dillin severely chastised the assembled lawyers for not "dispelling the paranoid attitude that the court will exercise continuing jurisdiction to alter the plan every year."[442] The judge said that once a final plan was promulgated and implemented the case would be administratively closed and no other adjustments would be made in the absence of bad faith. The judge ordered the intervening plaintiffs to file with the court a statement of issues which they intended to present. He also ordered the United States Government to "decide which side it is on and file a statement accordingly."[443]

B. Second Remedy Trial

The trial to relitigate, as mandated by the court of appeals,[444] the question of whether a legal basis for an interdistrict remedy existed commenced on March 18, 1975. The law with respect to interdistrict remedies was still far from resolved, but it was much clearer in 1975 than it had been two years earlier at the first remedy trial. The focal point of this trial was whether a legal basis for an interdistrict remedy could be found in the Uni-Gov statute, the zoning laws and practices in Marion County, or the location of public housing projects by the Housing Authority of the City of Indianapolis.

The United States was still ambivalent about its position. The attorneys for the Government opened the trial by announcing to the court they had no witnesses to call. Their contribution to the evidence would be four exhibits which were stipulated into evidence.[445]

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[442]Author's personal notes.

[443]*Id.* At this pretrial conference Judge Dillin ordered all lawyers representing defendants to file with the court a statement of the fees they had received and the basis used for billing their clients. Judge Dillin indicated he needed this information because at a later date he may award attorneys' fees to intervening plaintiffs.

[444]503 F.2d at 80.

[445]The four exhibits were:

1) a list of annexation ordinances passed by the Indianapolis City Council from 1953 to 1969.

2) a map showing the expansion of the civil city of Indianapolis from the creation of the original city to 1969.

3) a list of special fire and police district annexation ordinances for the period of 1970 to 1974.

The intervening plaintiffs presented six witnesses,[446] five[447] of whom had some involvement with Uni-Gov, zoning practices in Marion County, or location of public housing projects.

Some evidence had been developed at the 1973 trial with respect to the Uni-Gov issue, but Judge Dillin had reserved the ruling on the question of whether Uni-Gov provided the legal basis for an interdistrict remedy.[448] Now Judge Dillin encouraged both plaintiffs and defendants to offer additional evidence bearing on that issue.[449] The principal objective of the intervening plaintiffs at this trial was to prove the IPS boundaries were not expanded to conform to the Indianapolis boundaries as a part of Uni-Gov in order to maintain segregated school systems. The intervening plaintiffs were completely unsuccessful in proving discriminatory intent, but the effect of Uni-Gov remained a viable issue.

The intervening plaintiffs called Ray Crowe, a black member of the Indiana House of Representatives, from Marion County. Crowe was a member of the Affairs of Marion County Committee, which considered the Uni-Gov legislation in 1969. Crowe's testimony did not significantly help the case for an interdistrict remedy. He testified on direct examination that "there was some input from representatives from school corporations in Marion County, Indiana . . . ."[450] On examination by a Justice Department attorney, however, Crowe clarified this statement and said, "I

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4) a map showing the current boundaries of the Indianapolis police and fire service districts.

Index of Exhibits, introduced Mar. 18, 1975. Record, vol. I, at 32-38.

[446]Mr. William Abrams, city planner for the Division of Metropolitan Development. *Id.* at 41; Ray Crowe, formerly a member of the Indiana House of Representatives from district 42 in Marion County. *Id.* at 46; Charles Whistler, former president of the Metropolitan Plan Commission. *Id.* at 53-54; John W. Mullin, assistant director for management of Housing Authority, City of Indianapolis. *Id.* at 69; John Liell, sociologist. *Id.* at 109; Richard G. Lugar, Mayor of the City of Indianapolis. *Id.*, vol. II, at 158.

[447]John Liell was the only witness called by the intervening plaintiffs who did not have direct involvement in any of the three areas. Liell had testified for the intervening plaintiffs at the previous remedy trial.

[448]368 F. Supp. at 1208.

[449]Pretrial conference, December 2, 1974, author's personal notes.

[450]Direct exam, March 18, 1975. Record, vol. I, at 48-49. The intervening plaintiffs' thesis was that schools were excluded from Uni-Gov because of political pressure from citizens' groups and school leaders in suburban Marion County, and that they resisted the inclusion of schools in Uni-Gov because they wanted to keep black students out of the suburban schools. This statement in the evidence is an apparent reference to that thesis.

am positive race did not enter into the discussions or reasons whatsoever."[451]

The intervening plaintiffs called Charles Whistler, former president of the Metropolitan Planning Commission and one of a group of attorneys who participated in drafting the Uni-Gov legislation. Whistler testified that schools were not included in the Uni-Gov bill because of the fact "that schools were independent of civil government, that the people had worked hard to get their schools reorganized, built and developed, and they were proud of them and they didn't want schools to be involved in any way, shape, or form in Uni-Gov."[452] Whistler testified that the section of the Uni-Gov bill which specifically excluded schools from the geographic expansion of the civil city was included only to provide absolute clarity. It was Whistler's opinion that even if the section had not been included in the bill, schools would not have been affected by Uni-Gov.[453]

The star witness of the 2½-day trial was Indianapolis Mayor Richard G. Lugar, who was called by the intervening plaintiffs. Lugar was the mayor when Uni-Gov was enacted and is generally regarded as being the person primarily responsible for obtaining enactment of the legislation. Counsel for the intervening plaintiffs examined Lugar only briefly. The direct examination is contained in ten pages of the trial transcript.[454] Lugar's star billing was misleading. His testimony did not add anything significant to the evidence bearing on the legal impact of Uni-Gov. Lugar testified that the inclusion of schools in the Uni-Gov bill was never seriously considered and in his judgment, if the schools had been included in the bill "it would not have passed."[455]

Judge Dillin was visibly disappointed when the United States and the intervening plaintiffs rested their cases. The judge's words as they appear in the transcript do not fully convey his sentiment.[456] Judge Dillin's reaction is understandable. The trial made no meaningful contribution to the body of evidence which then existed.

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[451]Cross exam, Mar. 18, 1975. Record, vol. I, at 51.

[452]Direct exam, Mar. 18, 1975. Record, vol. I, at 58.

[453]Cross exam, Mar. 18, 1975. Record, vol. I, at 63-64.

[454]Record, vol. II, at 158-67.

[455]*Id.* at 165.

[456]The transcript shows that the judge said only "[t]hat was brief, indeed." Record, vol. II, at 198. Again near the end of the hearing the judge expressed surprise and dismay at the brief presentation of evidence. *Id.*, vol. III, at 329. The defendants called only two witnesses and the United States, in rebuttal, called two more witnesses. Index of witnesses, record, vol. I, at iv.

C. The Opinion

The trial concluded on March 24, 1975, and the judge gave the parties 10 days to file post-trial briefs. Given the judge's statement at the pretrial conference that he "did not want to get into another summer trial pushed up to a deadline" by school starting,[457] it was anticipated a decision would be forthcoming before summer. However, the decision was not announced until August 1, 1975, approximately one month before school was to reopen. The memorandum of decision did not throughly document all aspects of the ruling as Judge Dillin had done in his two earlier major opinions in the case. Judge Dillin again found that an interdistrict remedy was indicated, this time for all public schools in Marion County.[458] Three legal bases are given, but the rationale of the opinion is somewhat obscure. The judge found that

> the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited interdistrict remedy within all of Marion County, Indiana, as hereafter described.[459]

Judge Dillin said, "When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation [with] IPS."[460]

As the second basis for an interdistrict remedy, Judge Dillin held,

> The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI [Housing Authority of the City of Indianapolis] is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations . . . . The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State

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[457]Pretrial conference, December 2, 1974, author's personal notes.

[458]Memorandum of Decision, Aug. 1, 1975.

[459]*Id.* at 5.

[460]*Id.*

of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.[461]

The third ground for the decision involved the suburbs. Judge Dillin said,

> The evidence in the record, as taken in all hearings, clearly shows that the suburban Marion County units of government, including the added defendant school corporations, have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and the inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.[462]

Based on these findings, Judge Dillin ordered black students from IPS grades one through nine transferred to each of the suburban school districts in such numbers as would cause the total enrollment of pupils in each suburban school to be approximately 15 percent black after the transfers. Washington Township schools, which would have a black enrollment of approximately 15 percent, and Pike Township schools, which would have a black enrollment of approximately 12 percent, were excluded from the plan. All other suburban school defendants were ordered to accept the transfers for the 1975-76 school year and each year thereafter. Once transferred to a suburban school, a student would continue to attend that school until graduation from high school unless the student moved out of IPS territory.[463]

The opinion indicated the order would require transferring 6,533 students in grades 1 through 9 to suburban schools for the fall of 1975.[464] The number of transfers would increase for each of the next 4 years as the transfer of high school students commenced

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[461] *Id.* at 2-3.

[462] *Id.* at 3.

[463] *Id.* at 9-11.

[464] *Id.* at 9.

until approximately 9,525 black students would be transferred to the suburban school districts.[465]

The court ordered IPS to submit, on or before October 15, 1975, a final plan for desegregation of the remaining IPS schools. The opinion suggested that if the plan were approved, it would be put into effect at the beginning of the second semester of the 1975-76 school year.[466]

Since Judge Dillin has stayed the ordering of a transfer of IPS students to suburban schools in August of 1973, it was widely assumed he would do so again. He again surprised the speculators. Immediately after entering the order Judge Dillin left Indianapolis to attend the ABA convention in Montreal. A motion for a stay was immediately filed with Judge William E. Steckler. On August 8, 1975, Judge Steckler, reportedly after consultation with Judge Dillin in Canada,[467] denied the motion for a stay. On the same day, Judge Steckler granted a renewed petition to intervene filed by the Indiana State Teachers Association.[468] The defendant schools immediately sought and obtained a stay of the implementation of the order from the United States Court of Appeals for the Seventh Circuit.[469]

VIII. Court of Appeals Affirms the Interdistrict Remedy

On July 16, 1976, a divided United States Court of Appeals for the Seventh Circuit affirmed the interdistrict remedy ordered by Judge Dillin on August 1, 1975.[470] The court held that on the principles of *Milliken v. Bradley*[471] the interdistrict remedy ordered by Judge Dillin was legally permissible.

The court concluded that the exclusion of the public schools from the territorial expansion of Uni-Gov constituted an inter-

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[465]*Id.*

[466]*Id.* at 10-11.

[467]News, Aug. 9, 1975, at 1, col. 1.

[468]Order, Aug. 8, 1975.

[469]On August 22, 1975, the court of appeals ordered that the implementation of the plan be stayed.

[470]United States v. Board of School Comm'rs, No. IP-68-C-225 (7th Cir., July 16, 1976). The court of appeals action came just 15 days less than one year after the district court's decision. In a footnote to his opinion Judge Tone, the dissenter, attributes the delay to the fact Tone initially voted to affirm and was assigned to write the opinion. During the preparation of the opinion Judge Tone "came to the view reflected in this dissent." The opinion was reassigned to Judge Swygert, who along with Chief Judge Fairchild voted to affirm Judge Dillin's opinion. *Id.* at 24.

[471]418 U.S. 717 (1974).

district violation which justified an interdistrict remedy. Uni-Gov and its companion legislation[472] which repealed the law automatically extending school district boundaries upon expansion of the civil city, "had an obvious racial segregative impact."[473] The court said,

> Because, in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were "[A] substantial cause of interdistrict segregation." *Milliken v. Bradley*, 418 U.S. 717, 745 (1974), and "[C]ontributed to the separation of the races by . . . redrawing school district lines. . . ." *Id.* at 755 (Stewart, J., concurring).[474]

The analysis of the court of appeals seems to hold that since the Uni-Gov package had an "obvious racial segregative impact,"[475] the exclusion of IPS schools from Uni-Gov would *not* be an interdistrict violation only if there were a "compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation."[476] Given the segregative effect, the court held, the absence of racial motivation does not preclude a finding of an interdistrict violation.

The court suggests throughout the opinion that the actions of the Housing Authority of the City of Indianapolis in locating all public housing (the occupancy of which is 98 percent black) within the boundaries of IPS constituted an interdistrict violation. Judge Dillin found this action to be an interdistrict violation within the principles of *Milliken*. Despite all the discussion of the housing issue the court of appeals seems to affirm the interdistrict remedy solely on the Uni-Gov issue and not on the basis of the location of public housing. The court's discussion of the public housing issue is in support of the court's affirmance of Judge Dillin's injunction against the building of any additional public housing projects within IPS.[477]

The court concludes its opinion by "suggesting" that "the court [Judge Dillin] monitor the transference of black pupils from IPS to other school districts periodically, perhaps on a yearly

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[472]Chapter 52, 1969 Acts.

[473]No. IP-68-C-225 (7th Cir., July 16, 1976), at 18.

[474]*Id.* at 17.

[475]*Id.* at 18.

[476]*Id.* at 22.

[477]*Id.* at 24.

basis, in order that modifications, if necessary, may be made."[478] As is discussed earlier in this paper annual modifications of a plan have been a frequently expressed fear of suburban school officials and their lawyers. Judge Dillin partially allayed those fears when he told the lawyers at the pretrial conference on December 2, 1974, that he did not intend to "exercise continuing jurisdiction to alter the plan every year."[479] Judge Swygert's opinion will likely rekindle these fears.[480]

On August 20, 1976, Mr. Justice Stevens granted the suburban schools a stay of the interdistrict portion of Judge Dillin's August 1, 1975, order pending possible review by the United States Supreme Court.[481] The stay granted by Justice Stevens likely eliminates the possibility of any further desegregation of Marion County schools before the 1977-78 academic year.

VIII. Conclusion & Commentary

The racial composition of schools in Marion County has been in continuous litigation for eight years and the termination of the case is not in sight. This study is an interim report but several general observations can be made about the first eight years of the litigation.

It is generally overlooked today that one of the original objectives has been achieved. When the United States Department of Justice filed the complaint on May 21, 1968, the faculties of IPS schools were racially identifiable. Within the first two years of the case this defect was voluntarily changed by IPS. The case has thus accomplished the first significant step toward a unitary school system. This result was accomplished early in the litigation because the IPS Board recognized its legal responsibility and was politically able to act accordingly. The faculties were not, however, desegregated until after the case was filed.

From this writer's perspective the most significant aspect to date in the ongoing contested litigation is its poignant demonstration of the impact of an independent federal judiciary. Judge Dillin has stubbornly persevered in applying the law as he understands it. The hundreds of hours of research and investigation which this writer has spent preparing this study did not produce a single bit of evidence that Judge Dillin ever paid any heed

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[478] *Id.*

[479] See note 383 *supra.*

[480] At the pretrial conference Judge Dillin characterized these fears as a "paranoid attitude."

[481] Metropolitan School District of Perry Twp. v. Buckley, No. 76-212 (U.S., Aug. 20, 1976).

to public opinion. This observation comes in a case in which the public opinion is very visible and emotionally charged. Most people in Indianapolis have always been opposed to the judge's approach to the case and there have been times when Judge Dillin did not have the support of any recognizable segment of the community. From the time Judge Dillin found IPS to be unlawfully segregated on August 18, 1971, he has pursued the course of most pronounced resistance. Undoubtedly this has come only at great personal sacrifice. The persistent, critical, sometimes personal commentary from politicians and newspapers for nearly five years has not had any discernible impact on the judge.

This writer is convinced that Judge Dillin's handling of the case is not a result of a desire to control the public school systems in Marion County, as has been charged frequently. From the outset of the remedy portion of the case Judge Dillin has urged, pleaded and practically begged the school corporations to voluntarily resolve the problem. Judge Dillin has repeatedly assured the suburban schools that if an acceptable voluntary plan were presented the case would be closed like any other civil lawsuit which had been settled. Fears of continued oversight of a plan and year-to-year adjustment have had no basis in fact. At times Judge Dillin seemed to be begging for a way to get rid of the case. Unfortunately, the only effect of the efforts seemed to be to strengthen the resolve of the defendants.

In addition, Judge Dillin consistently encouraged the State of Indiana to assume responsibility for the problem. Judge Dillin paid all due respect to principles of comity, but the State of Indiana declined the invitation. State officials, in both the legislative and executive branches, do not have life tenure and they flatly refused to get involved.

These observations are not judgmental. Some will say these facts demonstrated the strength of an independent federal judiciary. Others will say these facts present a solid case for a constitutional change regarding the life tenure of federal judges.

The protracted nature of the case has resulted in some benefits. Public acceptance of increased integration, or at least a less vocal opposition, has significantly increased in Indianapolis since 1968.

Possibly the most widespread resistance came in 1971 when the first court-ordered busing occurred. Judge Dillin ordered IPS to take action to stabilize the racial balance in schools approaching the 40 percent tipping point. IPS reassigned less than 1,000 elementary students and 900 ninth- and tenth-grade students were assigned to previously all-black Crispus Attucks High School. Not

even all of these students were bused, but this action incurred the wrath of the public. The adverse reaction was no greater in 1973 when the interim desegregation plan resulted in 9,300 students being reassigned, 80 percent of them being bused. Finally in 1975, when Judge Dillin ordered another 6,500 students bused to suburban schools, to be followed by more reassignments within IPS, this writer sensed that the resistance was somewhat more temperate. The 1975 experience is, of course, distinguishable from the earlier episodes in that the order was stayed before any students were bused.

The advantages resulting from the delays were not, however, maximized by Judge Dillin. The reassignments which came every two years could have easily been made an annual event. This could have been accomplished by requiring strict compliance with the 1971 order that schools nearing the 40 percent tipping point be stabilized. Many schools which were near the 40 percent tipping point in 1971 are predominately black in 1976.

Another chance to utilize delay was lost in 1975. After the United States Court of Appeals stayed the interdistrict portion of the August 1, 1975, order, IPS asked for and was given a stay from Judge Dillin's order that IPS prepare a plan for the desegregation of the remainder of IPS. Even if it were necessary to forestall any action until the appeals were resolved, the preparation of alternative plans, as was done in 1973, would have been desirable. To date parents and community groups have been given no opportunity to respond to a proposed plan before its implementation. If the August 1, 1975, order were not stayed as to proposal of a plan by IPS, the plans could have been scrutinized by the community during the pendency of the appeals. Instead, that period of nearly a year has been spent waiting. If past experience is a guide, the time for promulgation and implementation of a plan, following the appeals, will be so short there again will not be time for public scrutiny. The desired public scrutiny being discussed here is not the same as the public opinion referred to earlier in this article. Even though Judge Dillin is not concerned with public opinion it is believed that he should recognize and consider specific, reasoned comments from community sources regarding *details* of a proposed plan. This is possible only if a proposed plan is submitted far enough in advance of the desired implementation date to permit public scrutiny.

In the May 1976 school board election, for the first time since its inception in 1930 the Citizens School Committee slate of candidates (running in 1976 under the banner of the Citizens for Neighborhood Schools) was defeated in its entirety by a more

progressive slate of candidates. Four of the newly-elected board members assumed office on July 1, 1976. Mary Busch, one of the new board members, was elected president of the board. One of the first acts of the new board members was the approval of a highly symbolic resolution favoring the establishment of the birthday of Dr. Martin Luther King, Jr. as a school holiday. The change in membership of the IPS board could result in a major realignment of forces in the case and will likely result in a drastically different leadership approach to implementing whatever plan is ultimately approved by the courts.

Many unknown factors will play an important role in the ultimate outcome of this long, tedious litigation. The most notable future decisions affecting the case will be the judgment of the Supreme Court of the United States as to whether to review the case and its decision in the event a review is undertaken, and the decision of the voters on November 2, 1976, as to whether Gerald Ford or Jimmy Carter will provide the national leadership for the next four years. Any prediction pending these two determinations would be pure folly.

Comment

Enabling Legislation for Collective Action by Public Employees and the Veto of Indiana House Bill 1053

EDWARD L. SUNTRUP*

With the advent of increased collective bargaining activity in the public sector, there has been, in the last decade, a rush on the part of state legislatures to enact legislation allowing collective bargaining for public employees. The provisions of the laws passed, however, vary considerably in terms of (1) the level of public employees covered (state or local), (2) items that are negotiable, (3) specific occupational categories of employees covered, (4) procedures for unit petition and impasse resolution, and (5) the legality of strikes. In addition, many of the statutes present linguistic challenges to interpretation. For example, in dispute resolution clauses of state laws, it has been noted that "[w]hat many would consider to be factfinding is, in some legislation, called mediation. In other statutes the terms factfinding and arbitration are so interconnected that interpretation of what is actually meant is most difficult."[1] Despite these difficulties, a majority of states have enacted some form of facilitative legislation.[2] It can be expected that the others will follow suit shortly in spite of continued discussion of proposed federal legislation for collective action by state and local public employees.[3]

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[1]Sinicropi & Gilroy, *The Legal Framework of Public Sector Dispute Resolution*, 28 ARB. J. (n.s.) 1, 2 (1973).

[2]For a summary of more recent state legislative activity, see BNA GOV'T. EMPLOYEE REL. REP. No. 51:501 to :523 (1975).

[3]

> In October, 1974, the U.S. Senate Subcommittee on Labor of the Committee on Labor in Public Welfare held hearings on two proposed bills. These bills were S. 3294 (matched in the House by H.R. 9730) which would amend the National Labor Relations Act (NLRA) to cover public employees and S. 3295 (National Public Employment Relations Act—NPERA) (duplicated in the House by H.R. 8677) which would establish a new, independent labor agency to determine bargaining units and resolve unfair labor practice charges.

Accompanying the increased collective bargaining activity and experience in the public sector, there has been an increased sophistication in the understanding of both the labor relations issues at stake and the legislation needed to resolve these issues. With this sophistication, it can be tentatively proposed that legislative amendments to existing laws may result in a semblance of uniformity in the laws as well as a clarification of some of the more knotty linguistic problems. An alternative to ex post facto amendment is executive veto of proposed legislation to clarify certain issues before they become problematic during the organized labor relations processes that follow. However, the veto of any proposed state labor legislation has been relatively rare. For this reason Indiana Governor Otis R. Bowen's veto in 1975 of House Bill 1053[4] provides a focus for the discussion of certain public sector labor relations questions which have analogies in other states as well.

I. Background of House Bill 1053

Prior to 1973, the Indiana Code dealt generally with the regulation of labor relations in Indiana, but did not enable collective action for them. Through a series of statutes the Indiana General Assembly has provided specific legislation to cover different categories of employees. Public Law 217,[5] enacted in 1973, provides protection for collective action by certificated educational employees,[6] but prohibits, *inter alia*, strikes by school employees,[7] and deficit financing by school employers.[8] The statute created the

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A third bill, backed by the independent Assembly of Governmental Employees (AGE), the National Public Employee Merit System and Representative Act (S. 647), then pending before the Senate and House, Post Office and Civil Service Committees, and in the House of Representatives H.R. 4293, would require state and local governments to recognize the right to organize but permit them the freedom to develop their own public sector labor legislation with the proviso that the merit system principle is protected.

BNA Gov't. Employee Rel. Rep. No. 61:211 (1975). An excellent discussion of the pros and cons of a federal collective bargaining law for state and local employees can be found in *A Federal Collective Bargaining Law for Public Sector—Pros and Cons Reviewed*, P-H Pub. Personnel Admin.-Lab. Mgmt. Rel. Rep. ¶ 3111 (1974).

[4]Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess. (1975).

[5]Act of April 24, 1973, Ind. Pub. L. No. 217, *codified at* Ind. Code §§ 20-7.5-1-1 to -14 (Burns 1975).

[6]Ind. Code § 20-7.5-1-6(a) (Burns 1975).

[7]*Id.* § 20-7.5-1-14(a).

[8]*Id.* § 20-7.5-1-3. The purpose of this Comment is not to provide a resume of all relevant Indiana Code sections, but rather to underline some points of existing law which figured strongly, by comparison, in Governor Bowen's veto of House Bill 1053.

Indiana Education Employment Relations Board (IEERB)[9] to administer in the areas of unit and representation determination, mediation, and factfinding for the certificated employees opting for collective action.[10] Public Law 254,[11] enacted in 1975, provides protection for collective action by other categories of public employees, but expressly excludes from coverage "policemen, firemen, professional engineers, faculty members of any university or certificated employees of school corporations or confidential employees or municipal or county health care institution employees."[12]

House Bill 1053 was intended by the General Assembly to continue the process of expanding collective action rights for public employees by extending the rights to police officers and firefighters. Although Public Laws 217 and 254 had been signed into law by Governor Bowen, House Bill 1053 was vetoed on April 17, 1975. Thus present public safety personnel have no legislative coverage for collective action rights because of their exclusion from coverage by Public Law 254.

II. Reasoning Behind the Veto

In his message to the House of Representatives regarding his veto of House Bill 1053,[13] and in other public addresses, Governor

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[9] Ind. Code § 20-7.5-1-9 (Burns 1975).

[10]

> During [its] first year of operation the Board was requested to intervene in 100 cases to make determinations as to the proper make up of the [collective bargaining] unit. In 50 of these cases the Board was able to prevail upon the parties to reach agreement without formal Board action. In the other 50 cases the Board made formal and final determinations establishing the membership of the unit.

[1973-1974] Ind. Ed. Empl. Rel. Bd. Ann. Rep. 1-2.

[11] Act of April 25, 1975, Ind. Pub. L. No. 254, *codified at* Ind. Code §§ 22-6-4-1 to -13 (Burns Supp. 1975).

[12] Ind. Code § 22-6-4-1(c) (Burns Supp. 1975).

[13]

> MESSAGE FROM THE GOVERNOR
>
> Mr. Speaker and Members of the House of Representatives:
>
> I have this 17th day of April, 1975, vetoed House Enrolled Act 1053.
>
> This bill contains three structural defects which are of such a magnitude that its implementation would put an undue and unacceptable burden on the municipalities and citizens of the State of Indiana.
>
> First, the bill does not contain an effective prohibition against strikes by the covered employees.
>
> Second, due to the definition of the term "deficit financing", and the timetable provided for the resolution of bargaining issues, the bill fails to incorporate safeguards which would insure the continued fiscal viability of the municipalities involved.
>
> Third, by making it an unfair practice for an employer to refuse to bargain about "any" of the bill's provisions, the door is open for

Bowen indicated that he was not, in principle, opposed to collective bargaining legislation for public safety employees.[14] His veto was based, rather, on what he considered to be four insufficiencies in the bill itself.

Three of the insufficiencies were structural. The first two of these dealt with prohibitions against strikes and deficit financing. In a memorandum to the members of the General Assembly four days after the veto,[15] Governor Bowen presented the legal details of these two issues. The strike prohibition language[16] was considered inadequate because it was contained within the introductory "non-code amendatory section of the act. This placement is of substantial legal significance, for the enduring status of such provisions is in considerable and varying legal question."[17] Further, House Bill 1053 contained "ambiguous and legally provocative"[18] statutory sanctions against strikes, a defect not considered to exist in Public Law 217.[19] As to the second deficiency, Governor Bowen considered the difference between the employing bodies affected by the limitation on deficit financing to be controlling. Public Law 217 defines "deficit financing" as "expenditures in excess of monies legally available to the employer,"[20] whereas

> bargaining involving matters of strikes, public policy and any other matter appropriately and traditionally left to the discretion of the appropriate governmental authorities.
>
> I recognize fully the essential contributions made by police and fire-fighting agencies in the State of Indiana. It is only fair that policemen and firemen be allowed to exercise collective bargaining privileges as are granted to other public employees. By the critical nature of their services, however, it is necessary that the citizens of the State of Indiana be assured that their services will always be available and that the fiscal soundness and administrative practices of local governments will not be undermined by well-meaning but open-ended legislation.
>
> While I am in sympathy and agree with the thrust of this bill, my opinion is that collective bargaining for policemen and firemen must be be coupled with reform of the present pension system for those groups and its method of funding.
>
> OTIS R. BOWEN, M.D., Governor

1975 IND. HOUSE J. 1031-32.

[14]Address by Governor Otis R. Bowen to the Indiana Fire Chiefs' Association, August 22, 1975.

[15]Letter and memorandum from Governor Otis R. Bowen to the Members of the Indiana General Assembly, April 21, 1975. Governor Bowen's memorandum compared the provisions of Public Law 217 and House Bill 1053 without mentioning Public Law 254.

[16]Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess., § 1 (1975).

[17]Memorandum, *supra* note 15, at 1.

[18]*Id.* at 2.

[19]*Id.*

[20]IND. CODE § 20-7.5-1-2(q) (Burns 1975). Public Law 254 contains the same definition. IND CODE § 22-6-4-1(*l*) (Burns Supp. 1975).

House Bill 1053 replaces employer with "corporate authorities."[21] The Governor argued that the employer involved in Public Law 217 "exists solely for the purpose of administering a single educational function,"[22] while the corporate authority in House Bill 1053

> exists to provide a full range of public services—of which police and fire protection is but a part. When applied to those two different situations, statutory language that generally *appears* the same tends to work out quite differently because, unlike teacher bargainers, police and fire bargainers would have a much broader expanse of tax dollars *legally* available for bargaining, yet the receipt of which would require the substantial cutback or elimination of other local governmental services.[23]

The third structural difficulty lay in House Bill 1053's provision that it would be an unfair practice for an employer to "refuse to bargain collectively in good faith with an exclusive representative *any provisions* of this chapter."[24] The Governor argued that this opened up a gamut of issues as bargainable, including "matters of strikes, public policy and any other matter appropriately and traditionally left to the discretion of the appropriate governmental authorities."[25]

The fourth basis of the veto was a statutory insufficiency. It was Governor Bowen's opinion "that collective bargaining for policemen and firemen must be coupled with reform of the present pension system for those groups and its method of funding."[26] This was considered necessary to offset the requirement of "an ever expanding percentage of local revenues to fund pensions for those no longer rendering active service."[27]

III. Commentary

In short, the Governor's veto of House Bill 1053 deals with (1) the strike, (2) deficit financing, (3) contract scope, and (4) the relationship between the enactment of *any* legislation to cover collective action by public safety employees and pension reform.

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[21]Ind. H. R. 1053, 99th Gen. Assembly, 1st Sess., § 2 Sec. 1(f) (1975).

[22]Memorandum, *supra* note 15, at 3.

[23]*Id.* at 3 (emphasis in original).

[24]Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess., § 2 Sec. 18(a)(5) (1975) (emphasis supplied).

[25]Message, *supra* note 13, at 1031.

[26]*Id.* at 1031-32.

[27]Address, *supra* note 14, at 5 (emphasis in original).

A. The Pension Factor

Pensions have traditionally been treated as one of the key fringe benefit items at the bargaining table in the private sector.[28] However, with increased expenditures for pensions in the public sector, especially for high risk occupations such as those dealing with public safety,[29] a stance taken by some has been to treat pensions as a separate item not subject to collective bargaining. This is the position of Governor Bowen. A variation of this, for example, is found in New York where the state legislature passed a statutory prohibition against all pension bargaining, effective until this year.[30] The result is what has become known as double-deck bargaining.

> The dilution by statutes and the resulting uncertainty of the public employer's bargaining authority in some areas has been a factor in perpetuating the practice of *double-deck bargaining,* or the legislative "end run." This technique allows employee organizations to seek improvements upon or obtain benefits from the appropriate legislative body that they were unable to obtain at the bargaining table or that they were required by law to obtain at the legislative level.[31]

A variation of double-deck bargaining has received emphasis in Indiana since the Governor's veto of House Bill 1053. The legislative Pension Study Committee received testimony in the fall of 1975 from the Fraternal Order of Police, the Professional Firefighters Association of Indiana, as well as from other interest groups such as the Indiana Association of Cities and Towns, the Excise Police and Conservation Officers, the Judges' Association and the State Police.[32] The Committee to Study All Governmentally Administered Pension Funds—State and Local Levels was designed

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[28]In addition to pensions, insurance against illness and supplementary unemployment benefits (SUB) also traditionally have been key fringe benefit bargaining items in the private sector. "The direct costs of these fringe benefits, and their significance in the total employee compensation picture, all require that they be discussed as 'wages.'" G. BLOOM & H. NORTHRUP, ECONOMICS OF LABOR RELATIONS 154 (1973).

[29]"In New York City, for example, the annual pension costs [for all categories of personnel] for 1975 have been estimated at $750 million." *Id.* at 157.

[30]See A. Anderson, *Labor Relations in the Public Service,* in 3 D. YODER AND H. HENEMAN, JR., EMPLOYEE AND LABOR RELATIONS 7-91 (1976) [hereinafter cited as A. Anderson].

[31]*Id.* (emphasis in original). An argument in favor of this option is that it removes one more item—potentially a very problematic one—from the possibility of impasse at the bargaining table during contract negotiations.

[32]Minutes of the Pension Study Committee Meeting, Sept. 23, 1975.

in part to facilitate the discussion of legislation in the police and fire area by the Legislative Council and the General Assembly.[33]

The importance attributed to the pension question as a special legislative issue for public safety employees by the Governor—which hinges on the more general question of contract scope limitations—is not mandated by Public Laws 217 and 254 which cover other categories of employees. Public Law 217 includes as mandatory scope items for the school employer "salary, wages, hours, and salary and wage related fringe benefits"[34] and Public Law 254 states that both parties should "negotiate in good faith with respect to wages, hours and other terms and conditions of employment."[35] There is no express prohibition against the negotiability of pensions in either of these laws. In effect, there is differential restriction on contract scope if one compares the provisions of Public Laws 217 and 254 with the legislative recommendations of Governor Bowen embodied in the veto of House Bill 1053 as to the question of pensions. This is apparently justified, as the Governor has argued, on uniquely fiscal grounds.[36] An alternative to differential scope prohibition has been the introduction of House Bill 1378 as an amended version of Public Law 254, designed to obviate a separate statute for public safety personnel by including them under its provisions.[37] This treatment would resolve the legislative difficulties involved in collective action for public safety personnel but would not address the need for pension reform. The passage of such a bill in Indiana is unlikely.

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[33]Minutes of the Committee to Study All Governmentally Administered Pension Funds—State and Local Levels, Sept. 9, 1975.

[34]IND. CODE § 20-7.5-1-4 (Burns 1975).

[35]IND. CODE § 22-6-4-1(k) (Burns Supp. 1975).

[36]It has been estimated that $70 million per year over the next 40 years will be required to fund the present pension system for Indiana's 40,000 police and firefighters; and that an average of 40 percent of payroll expenditures for police and fire services currently is spent for pensions. Minutes, *supra* note 33.

[37]Ind. H.R. 1378, 99th Gen. Assembly, 2d Sess., § 1(k) (1976) (introduced by State Representative S. Halton). The applicable provision states:

> "Bargain collectively" means the performance of the mutual obligation of the employer through its chief executive officer or his designee and the designees of the exclusive representative to meet at reasonable times . . . and negotiate in good faith with respect to wages, hours and other terms and conditions of employment . . . .

A companion bill introduced by Senators M. Stanley and R. Garton also bypasses the pension problem and treats the scope question under the unfair practices provisions, making it an unfair practice for an employer to "refuse to bargain collectively in good faith with an exclusive representative about wages, rates of pay, hours, working conditions and all other terms or conditions of employment." Ind. S. 6, 99th Gen. Assembly, 2d Sess., § 1 Sec. 19(a)(5) (1976). Both bills have remained in committee.

B. Contract Scope Limitations

The Governor's position on the need for separate legislative action on pension reform theoretically is related to his objection to the lack of a limitation on bargaining scope in House Bill 1053.[38] The items subject to the bargaining process may be limited in a number of ways. They can be enumerated in a separate "subjects of bargaining" section and complemented by an unfair labor practice provision, as in Public Law 217,[39] or they can be treated under a definitional collective bargaining provision and complemented by an unfair labor practice provision, as in Public Law 254.[40] A third way of treating scope is to state under the unfair labor practices provisions, as in House Bill 1053, that it is an unfair practice for an employer "to refuse to bargain collectively in good faith any provisions of this chapter."[41] This procedure is extremely difficult to interpret in terms of scope and is arguably ambiguous. For example, the provisions dealing with the public safety employer's responsibility and authority—a management rights provision—state a number of areas where management rights should control, including directing the work of employees and establishing policy.[42] Yet the unfair labor practice provision would make all provisions of the chapter negotiable. It is not clear how these ambiguities would be reconciled when the parties meet to discuss, not the substance, but the scope of items to be collectively negotiated. If and when specific statutory coverage for safety personnel is provided, Public Law 217 would appear to provide the clearest model for scope items. If pensions, or any additional questions related to management rights, are to be excluded from negotiations, it must be recommended that the statute include a clear statement of them in a section dealing only with these questions. If further clarity of coverage is desired, this could be complemented with an appropriate clause under the unfair labor practice provisions.

C. The Deficit Financing Deficiency

The Governor's objection to the structural deficiency of deficit financing in House Bill 1053 can perhaps be dealt with more easily than any of the other items outlined in his veto message. The change in terminology from "corporate authority" to "employer," as far as can be determined from the wording of Public Laws 217 and 254, would provide similar legal coverage for

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[38]See text accompanying notes 24-25, *supra*.

[39]IND. CODE §§ 20-7.5-1-4, -7(a)(5) (Burns 1975).

[40]*Id.* §§ 22-6-4-1(k), -5(a)(5) (Burns Supp. 1975).

[41]Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess. § 2, Sec. 18(a)(5) (1975).

[42]*Id.* § 2, Sec. 3.

public safety negotiators as is provided for union representatives negotiating for other categories of public employees presently covered by law. As worded, House Bill 1053 probably would not have opened avenues for contravention of the letter of the law on deficit financing—that is, no outside borrowing would occur—but it could have led to a contradiction of the spirit of the law through intraorganizational budgetary shifts.

D. The Strike and Alternatives

The status of the strike remains a perennial sore thumb in the public sector. Public Laws 217 and 254 leave little room to question their intent and clearly join the majority of states in their prohibition of strikes.[43] The authors of House Bill 1053 may have attempted to erode the illegality of the strike through the legal technicality recognized by Governor Bowen.[44] Whether or not the effective omission was designed or accidental, it is highly unlikely that the police officers and firefighters of Indiana will have collective action legislation until a substitute for House Bill 1053, in whatever form, is revised to include either a strike prohibition clause, modeled after Public Laws 217 and 254, or a suitable alternative.

On the assumption that the strike is not necessary for leverage at the bargaining table—an assumption that, theoretically, no unionist would accept—a much discussed alternative is final offer, interest arbitration. This is a variation of arbitration under which a panel or single arbitrator selects the last offer of either management or labor on each or all items in dispute.[45] Although the idea of final offer arbitration was first suggested in 1966,[46] experience with it in the public sector is still limited.[47] Indiana was one

[43]With qualifications, strikes are permitted in Alaska, Hawaii, Oregon, Pennsylvania, and Vermont by statute; and in Montana by case law. They are generally prohibited in all other states with legislative or case law in the area. BNA GOV'T. EMPLOYEE REL. REP. No. 51:501 to :523 (1975).

[44]See text accompanying note 15, *supra.*

[45]Such a provision recently was provided by legislation for local employees in Connecticut. BNA GOV'T. EMPLOYEE REL. REP. No. 617 at B-11 to B-12 (July 4, 1975). *See also* Feigenbaum, *Final Offer Arbitration: Better Theory Than Practice*, 14 IND. REL. 311 (1975); Feuille, *Final Offer Arbitration and the Chilling Effect*, 14 IND. REL. 302 (1975).

[46]Stevens, *Is Compulsory Arbitration Compatible With Bargaining?*, 5 IND. REL. 38 (1966).

[47]There is a distinction among different types of arbitration depending on where they are used in the organized labor relations process. "Rights" or grievance arbitration, which is the most frequently used, concerns contract interpretation disputes. "Interest" arbitration occurs at the point of contract negotiations. There are many variations of interest arbitration: compulsory, which is mandated by law; voluntary, which is adopted voluntarily by the

of the first states in which voluntary experimentation with final offer arbitration was attempted. This occurred in 1972 when the city of Indianapolis and the union representing public works employees were unable to reach agreement.[48]

Indiana's legislative response to the potential of final offer, interest arbitration as an alternative to the strike has not been consistent. Public Law 217 provides for impasse procedures, including mediation and factfinding[49] which are initiated at the request of the parties involved[50] or by the IEERB according to a statutory "timetable for coordination of bargaining with the school corporation budget requirements."[51] It also allows the school employer and the exclusive representative to "at any time submit any issue in dispute to final and binding [interest] arbitration to an arbi-

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parties to resolve an impasse; binding, which by law or agreement requires acceptance of the arbitration decision; and advisory, which requires neither party, by law or prior agreement to accept the arbitration decision. Advisory, interest arbitration is procedurally similar to factfinding. The neutral third parties engaging in any of these variations of interest arbitration can be one person or a panel. *See* A. Anderson, *supra* note 30, at 7-105 to -106, -108. A good resume of aspects of interest arbitration can be found in MIDWEST MONITOR, May-June 1975, at 1-5 (School of Pub. & Environ. Affairs, Indiana Univ., Bloomington). "Final offer" interest arbitration in its widest sense here means: compulsory or voluntary, binding, interest arbitration whereby a panel or single arbitrator would choose either a union's or management's last offer on each or all particular items in dispute by the parties. This definition appears to encompass the variations of final offer, interest arbitration heretofore subject to experimentation. *See* Feigenbaum, *supra* note 45, at 313-16, for a comparison of final offer, interest arbitration either legislated or voluntarily tried in Eugene, Oregon; Wisconsin; Michigan; and Indianapolis, Indiana.

[48]Witney, *Final-Offer Arbitration: The Indianapolis Experience*, 96 MONTHLY LAB. REV. 20 (May 1973).

[49]IND. CODE § 20-7.5-1-13 (Burns 1975). Mediation is the process whereby a third party

> enters the negotiations to help the parties reach agreement. The mediator acts as a go-between guiding the parties into areas where agreement seems likely to occur. The mediator has no authority to compel agreement or make decisions on issues in dispute.

MIDWEST MONITOR, *supra* note 47, at 2. Factfinding (or advisory, interest arbitration) is the process whereby a third party

> investigates the dispute [usually] by holding a hearing. This technique which came into its own in the public sector, represents a greater degree of intervention than mediation. The parties in the dispute present their cases to the factfinder who then issues a report. This report may or may not include recommendations for settlement of the dispute. The parties are free to accept or reject these recommendations, but most often the factfinding report becomes the basis for settlement.

Id.

[50]IND. CODE §§ 20-7.5-1-13(a) to (b) (Burns 1975).

[51]*Id.* § 20-7.5-1-12.

trator appointed by the [IEERB]."[52] Thus Public Law 217 provides for voluntary, binding, interest arbitration but it does not provide for final offer, interest arbitration.[53] Public Law 254 likewise provides for mediation and factfinding in case of impasse,[54] but the substance of its provisions is considerably different from that of Public Law 217. Its timetable for bargaining[55] differs in detail from that of Public Law 217; and it provides that the findings and recommendations of the factfinder "shall be advisory only, *unless* the exclusive representative or the employer has previously notified the employer or exclusive representative that such recommendations are to be binding in which case they shall be binding."[56] In addition, the statutory provisions for arbitration procedures found in Public Law 254 are considerably more complex than those in Public Law 217. Public Law 254 provides leeway for the parties to substitute their own procedures to bring about impasse resolution or by utilizing "any other governmental or other agency or person in lieu of the [IEERB];"[57] it provides for voluntary, binding, interest arbitration similar to Public Law 217;[58] and it also provides for voluntary, final offer, interest arbitration.[59]

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[52] *Id.* § 20-7.5-1-13(c).

[53] Couched in this terminology is an important procedural difference. Public Law 217 provides for the possibility of an arbitrator to make a final, binding decision on an impasse issue. It does not say that the arbitrator must choose either one or the other final offer.

[54] IND. CODE § 22-6-4-11 (Burns Supp. 1975).

[55] *Id.*

[56] *Id.* § 22-6-4-11(c) (emphasis supplied). This practice, known as "Med-Arb," first originated in the Pacific Northwest. It provides a new twist in impasse procedures because "the mediator becomes the arbitrator on all issues yet unresolved through mediation. The arbitrator's decision then consists of all mediated settlements with all the remaining issues being determined by arbitration." MIDWEST MONITOR, *supra* note 47, at 3. On "Med-Arb", see also H. Davey, *Third Parties in Labor Relations—Negotiation, Mediation, Arbitration*, in 3 D. YODER & H. HENEMAN, JR., EMPLOYEE AND LABOR RELATIONS 7-203 to -204 (1976).

[57] IND. CODE § 22-6-4-13(g) (Burns Supp. 1975).

[58] *Id.* § 22-6-4-13(h).

[59]

> The parties *may* agree in any case where no agreement is reached to submit a final offer to the other party, which offer shall be transmitted to the board. Each party shall, at the same time, submit one [1] alternative offer. Final offers shall be presented within three [3] days from the date on which a party pursuant to the agreement requests submission of a final offer. The board shall transmit the offers to the other parties simultaneously:
>
> (1) If no final offer is submitted by a party, the last offer made by such party during the previous sessions shall be deemed that party's final offer.

A comparison of the impasse procedures of House Bill 1053 with those of Public Laws 217 and 254 provides yet further contrast in the areas of mediation and arbitration. House Bill 1053 does not use the term factfinding.[60] Rather, it directs that, if an agreement cannot be reached according to a given time schedule, the IEERB shall appoint a mediator.[61] If with the assistance of the mediator no agreement can be reached on given items within thirty days, "any unresolved issues *shall be* submitted to arbitration."[62] After a panel of arbitrators is selected and has conducted its hearing, "[a] majority decision of the arbitrators shall be binding upon both the employee organization and the corporate authorities."[63] Thus there is provision for compulsory, binding, interest arbitration. However, the arbitrators' decision may be appealed by the corporate authority over "the sole issue of whether the decision of the arbitrators places the corporate authority in [a] position of deficit financing;"[64] or may be avoided if "[a]ny agreements [are] actually negotiated between the employee or-

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(2) Any offer submitted by a party pursuant to this subsection must comply with the agreement of the parties with respect to issues in dispute: Provided, that the final offers shall not contain any issues that were not issues at the time of final dispute or impasse; contents of the agreements must be legal issues and not in conflict with the provisions of this chapter, or constitute demands upon the employer contrary to actions of the general assembly.

Id. § 22-6-4-12 (emphasis added). The statute then goes on to say that the parties shall continue to negotiate for five days after receiving each other's offer, with the assistance of an IEERB mediator if they desire. If they are still at an impasse after this time, a final offer arbitration panel should be selected within two days with or without the assistance of the IEERB. The panel then selects the most reasonable, in its estimation, of the final offers which will be binding on the parties. The statute then lays out the criteria that the panel must use in arriving at their decision on the final offers. *Id.*

[60]Interestingly, House Bill 1053 is the only one of the three that states a labor-management policy on the relationship between the strike and other types of impasse procedures. It does this in what the Governor calls the "non-code amendatory section of the Act." See note 15, *supra*. This section says specifically that:

> The establishment of this method of mediation and arbitration shall not, in any way whatsoever, be deemed to be a recognition by the state of compulsory arbitration as a superior method of settling labor disputes between employees who possess the right to strike and their employers, but rather shall be deemed to be a recognition solely of the necessity to provide some alternative mode of settling disputes where employees must, as a matter of public policy, be denied the usual right to strike.

Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess., § 1 (1975).

[61]*Id.* § 2, Sec. 7.

[62]*Id.* § 2, Sec. 8 (emphasis supplied).

[63]*Id.* § 2, Sec. 10.

[64]*Id.* § 2, Sec. 11.

ganization and the corporate authorities either before, or within thirty (30) calendar days after arbitration . . . ."[65]

Therefore, while the strike is forbidden in Indiana, statutory requirements or recommendations for strike alternatives are not consistent. Only Public Law 254 provides for one variation of final offer, interest arbitration in addition to a number of other alternatives. Any future legislative coverage for public safety personnel and others who are not presently covered by law could profit from a closer examination of the strike alternative model found in Public Law 254.[66]

IV. An Added Complexity

The statutory regulation of collective bargaining for public employees covered by Public Laws 217 and 254 assumes that both laws satisfy constitutional requirements of the state of Indiana. Whether in fact Public Law 254 does this has been called into question by a recent Benton Circuit Court ruling.[67]

The circumstances of the court's decision stem from the attempt by the Retail Clerks Union, Local No. 25, to file a representation petition with the IEERB to be certified as exclusive representative for certain employees of the Benton County School Corporation.[68] The school corporation, as plaintiff, sought a declaration that Public Law 254 was unconstitutional in that provisions of section 8 of Public Law 254 prohibited judicial review

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[65]*Id.* § 2, Sec. 14.

[66]There is no intention here to simplify the ultimate workability, or the specific procedural questions, related to either voluntary or compulsory final offer, interest arbitration. It is presented as an alternative to the strike and its long-range workability is not fully known. This is an empirical question. In the long run, bipartite labor-management negotiations would appear to be the ideal, rather than tripartite which introduces a third party in whatever capacity. However, since public sector policy has rather consistently questioned the wisdom of the legality of the strike—which is labor's "ace in the hole" in bipartite negotiations—final offer, interest arbitration appears to be a viable theoretical alternative to strike usage.

The assumption behind the potential effectiveness of compulsory, final offer, interest arbitration, which is not found in Public Law 217, Public Law 254, or the vetoed House Bill 1053, is that it will discourage unreasonable proposals by either labor or management by putting them in an all-or-nothing bargaining stance. In this sense, its theoretical long-range effectiveness would lie in the ability of negotiators to avoid its impact by negotiating reasonably before its potential application is realized. It is of interest that Ind. H.R. 1378, *supra* note 37, proposes that final offer, interest arbitration be compulsory rather than voluntary. This bill is still in committee as of the present writing.

[67]Benton Community School Corp. v. Indiana Educ. Employee Relations Bd., No. C75-141 (Benton Cir. Ct., Feb. 4, 1976).

[68]*Id.* (page 2 of findings of fact—conclusions of law).

of a state administrative agency's determinations in violation of article 1, section 12 of the Indiana Constitution.[69] Specifically, the plaintiff argued that section 8 prohibited judicial review of the determination by the IEERB of the appropriate bargaining unit and its certification of exclusive bargaining representation.[70] The court accepted the plaintiff's argument, and held that Public Law 254

> is unconstitutional since it violates Article I, Sec. 12, of the Constitution of the State of Indiana in that it prohibits judicial review in Subsections 8(d), (g), and (i) of state administrative agency determinations made in regard to representation proceedings held under Sec. 7 of said Act. The unconstitutional provisions are an integral part of the statute and are not severable from the remaining provisions. Therefore, the entire Act is void, and Defendants, Indiana Education Employment Relations Board, and its members are hereby permanently enjoined from further proceedings under Public Law 254, Acts of Indiana 1975.[71]

Although collective bargaining in the public sector without enabling legislation has been attempted by various states in the past, the peaceful implementation of the process is immensely enhanced by statutory protection. Wisdom would suggest that the constitutionality of Public Law 254, and consequently its applicability to public sector collective bargaining, be reviewed by a higher court, or that the constitutional defects be remedied by legislative amendment as quickly as possible.[72]

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> All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily and without delay.

IND. CONST. art. 1, § 12.

[70]No. C75-141 (Benton Cir. Ct., Feb. 4, 1976) (page 3 of findings).

[71]*Id.* (page 1 of judgment).

[72]Irrespective of how this constitutional issue is resolved, it can be stated as a general principle that the less third parties (neutrals, the judiciary or anyone else) enter the bipartite process, at any point, the better. Historically, American organized labor has had a profound mistrust of the courts as third parties entering labor-management relations processes because of the widespread use of the injunction against labor in the 19th and early 20th centuries before the passage of the Norris-La Guardia Anti-Injunction Act of 1932. G. BLOOM & H. NORTHRUP, ECONOMICS OF LABOR RELATIONS 565-66, 572-77 (1973).

CONCLUSION

The veto of House Bill 1053 by Governor Bowen touches on a number of major issues of enabling legislation for collective action by public employees in the state of Indiana which go beyond the immediate stretches of the bill itself. The veto underscores the difficult question of the strike, the alternatives to the strike supplied by interest arbitration procedures, and ultimately the wider question of the wisdom of tripartite versus bipartite collective bargaining in the public sector. The Benton Circuit Court decision provides a constitutional dimension which must be considered in any future legislative response to these questions. Resort to the courts, in whatever capacity, as part of the total labor-management process should not be legislatively encouraged.

Governor Bowen only indirectly addressed the question of interest arbitration procedures by way of his veto comments on the strike provisions of House Bill 1053. A comparison of impasse provisions in Public Law 217, Public Law 254, and House Bill 1053 reveals a marked variation. The exact reasoning which brought about this variation is not clear. Final offer arbitration is theoretically a viable impasse resolution alternative that is gaining some acceptance in other states.[73] In this sense, Public Law 254—assuming that its constitutional status will be clarified—on final offer, interest arbitration would be one possible model to follow. In addition, the authors of legislation to cover the remaining classes of public employees excluded from Public Laws 217 and 254 would do well to keep the principle of legislative consistency in mind.

The veto of House Bill 1053 because of its bargaining scope provisions and because it was not accompanied by pension reform for public safety personnel are two aspects of the same question: bargaining scope limitations. Since there appears to be little chance of enabling legislation for safety personnel until the pension systems are dealt with legislatively, Indiana can expect, in this respect, increased double-deck bargaining on the part of these personnel.

Lastly, the veto of House Bill 1053 must challenge by implication the policy of providing separate legislative coverage for different categories of public personnel. One alternative would be a single statute covering all categories of public personnel. It would appear, however, that Indiana has been committed to a piecemeal approach of separate legislation for different groups. At the very least, then, new legislation should be designed around the models of earlier statutes so that statutory consistency may be approximated.

[73]See Feigenbaum, *supra* note 45, for a discussion of the Michigan and Wisconsin statutes.

Note

Symbolic Speech

I. Introduction

Is freedom of nonverbal expression a *casus omissus* from the first amendment? In 1791[1] when the first ten amendments were adopted as the Bill of Rights of the United States Constitution, no mention was made respecting freedom of expression.[2] Madison,[3] Jefferson,[4] and others[5] had written and discussed the necessity of adding additional items to the Constitution; and although their views were rejected by many,[6] they did manage to prevail. The

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[1]At the first session of the new Congress, a Bill of Rights, including the first amendment, was proposed for adoption by the states and became a part of the Constitution December 15, 1971. *See* W. Hachen, The Supreme Court on Freedom of the Press 1 (1968).

[2]U.S. Const. amend. I.

[3]Madison announced his intention to discuss amendments to the Constitution on May 25th. *See* 2 B. Schwartz, The Bill of Rights: A Documentary History 1006 (1971).

[4]On March 18, 1789, Thomas Jefferson wrote to David Humphreys stating:

> I am one of those who think it a defect that the important rights, not placed in security by the frame of the constitution itself, were not explicitly secured by a supplementary declaration.

14 The Papers of Thomas Jefferson 676-79 (1899).

[5]*See* 1 J. Hare, American Constitutional Law (1889). Hare describes a discussion between Madison and Hamilton as follows:

> Power, so they argued, tends not only to increase in force and volume in its onward course, but to escape through unforeseen breaks and channels from the dikes by which it is confined. The restraints should therefore be so explicit that they cannot be misunderstood.

Id. at 506. *See also* 1 H. Ames, Proposed Amendments to the Constitution of the United States (1895); 1 H. Von Holst, The Constitutional and Political History of the United States (1889).

[6]*See* B. Mitchell & L. Mitchell, A Biography of the Constitution of the United States (1964). An example of the rationale followed by an opponent to the Bill of Rights is seen in Sedgwick's words. He considered the idea of a Bill of Rights a *reductio ad absurdum*. He stated:

> Inherent rights made a long list. Why did not the committee declare a man should have a right to wear his hat, get up, go to bed when he pleases? Government did not intend to violate the right of free speech and press.

Id. at 191. Eldridge Gerry of Massachusetts disagreed with Sedgwick and reproved him for trifling with a serious matter. Another example of the

first amendment as approved by the Founders prohibited Congress from making any law "abridging the freedom of speech, or of the press."[7] But nowhere in the first amendment was there a prohibition of laws abridging freedom of nonverbal conduct, freedom of thought, or freedom of symbolic speech.

Thomas Jefferson, in a letter to David Humphreys dated March 18, 1789, wrote that certain rights needed security by a declaration supplementary to the Constitution. Included within these rights needing protection were the "rights of thinking, and publishing our thoughts by speaking or writing, the right of free commerce, and the right of personal freedom."[8] Jefferson's views on freedom of thought and speech were in a minority when the First Congress assembled in April of 1789.[9] Two hundred and ten different amendments were proposed by the eight states represented, and with duplications omitted, there were almost a hundred different substantive provisions presented. Five of the eight states sought guarantees of freedom of the press, yet only three added freedom of speech as well.[10] Although freedom of speech was included within the Bill of Rights, it is questionable whether it was intended as anything more than a reiteration of freedom of the press. Unlike freedom of religion, assembly, and right to petition the government for a redress of grievances, freedom of speech and press are included within the same clause, without a semicolon separating them as two distinct items.[11] For

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rationale taken by an opponent to the Bill of Rights is displayed in the words of this countryman:

> Of a very different nature, tho' only one degree better than the other reasoning, is all that sublimity of nonsense and alarm, that has been thundered against it in every shape of metaphoric terror, on the subject of a bill of rights, the liberty of the press, rights of conscience, rights of taxation and election, trials in the vicinity, freedom of speech, trial by jury, and a standing army. These last are undoubtedly important points, much too important to depend on mere paper protection. For, guard such privileges by the strongest expressions, still if you leave the legislative and executive power in the hands of those who are or may be disposed to deprive you of them—you are but slaves.

Sherman, *Letters of a Countryman*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 218-19 (P. Ford ed. 1892) (italics omitted).

[7]U.S. CONST. amend. I.

[8]14 THE PAPERS OF THOMAS JEFFERSON 676-79 (1899).

[9]2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983 (1971).

[10]*Id.*

[11]U.S. CONST. amend. I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peace-

many years following the adoption of the amendment, the cases centered around freedom of the press.[12] Freedom of speech seemed to be nothing more than a restatement of the written freedoms. In light of the minor role freedom of speech played in the First Congress, it is highly unlikely that the Founders considered nonverbal communication.

Today, however, freedom of speech is seen as distinct from freedom of the press. With this recognition have come restrictions on the absolute wording of the first amendment in cases involving obscenity,[13] loudspeakers,[14] hostile audiences,[15] subversive speech,[16] captive audiences,[17] and slander.[18] Although it might appear that

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ably to assemble, and to petition the Government for a redress of grievances.

An interpretation of the first amendment discloses the view that in spite of its absolute wording it was not intended as such:

> That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy, at his pleasure, the reputation, the peace, the property, and even the personal safety of every other citizen.

3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 731-32 (1833).

[12] *See* 1 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 34-35 (1947); *See also* 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 876, 881, 883-86 (1927).

[13] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Ginsberg v. New York, 390 U.S. 629 (1968); Ginzburg v. United States, 383 U.S. 463 (1966); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957).

[14] *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948).

[15] *See e.g.*, Gregory v. City of Chicago, 394 U.S. 111 (1969); Feiner v. New York, 340 U.S. 315 (1951); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[16] *See, e.g.*, Communist Party v. Whitcomb, 414 U.S. 441 (1974); Brandenburg v. Ohio, 395 U.S. 444 (1969); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[17] *See, e.g.*, Public Utilities Comm'n v. Pollack, 343 U.S. 451 (1952); Martin v. City of Struthers, 319 U.S. 141 (1943). *See also* Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953).

[18] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Meyer v. Teamsters Joint Council 53, 416 Pa. 401, 206 A.2d 382, *cert. denied*, 382 U.S. 897 (1965); Fenstermacher v. Indianapolis Times Pub. Co., 102 Ind. App. 189, 1 N.E.2d 655 (1936).

the courts have continually restricted the broad wording of the first amendment, there is one area in which they have expanded it—symbolic speech.

The concept of symbolic speech emanates from the 1967 case of *United States v. O'Brien.*[19] On March 31, 1966, David Paul O'Brien burned his draft card on the steps of the South Boston Courthouse. He was subsequently convicted of violating a federal statute which made the knowing destruction or mutilation of such a certificate a criminal offense.[20] The Court of Appeals for the First Circuit reversed O'Brien's conviction, holding that the federal statute violated the freedom of speech clause of the United States Constitution.[21] The Supreme Court, however, reinstated the district court's conviction.[22] Despite the fact that O'Brien's conviction

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[19]391 U.S. 367 (1968). Many people feel that symbolic speech really emanates from three cases prior to *O'Brien.* The initial case may have been Stromberg v. California, 283 U.S. 359 (1931). In this case appellant was convicted for violating the California Penal Code, which prohibited the public display of "any flag, badge, banner or device . . . as a sign, symbol or emblem of opposition to organized government." *Id.* at 361. The action was clearly conduct and not a verbal form of communication. Although the Court mentioned that there was a necessity for free political discussion, it overturned Stromberg's conviction on fourteenth amendment grounds. A second case involving conduct as opposed to "pure" speech arose in 1943. In Board of Educ. v. Barnette, 319 U.S. 624 (1943), students were expelled from a school for refusing to pledge allegiance to the flag. Here again, the activity was nonverbal expression. In this case, the Supreme Court resorted to the first amendment. However, the Court held the expulsion to be a violation of freedom of religion and not freedom of speech. A third case preceding *O'Brien* was Brown v. Louisiana, 383 U.S. 131 (1966). Brown, in opposition to the segregationist policy practiced by a local library, sat down in a silent protest. He was convicted of breach of peace in violation of a Louisiana statute. The Supreme Court reversed Brown's conviction. Basing the decision on the first amendment right to peaceably assemble, the Court stated that :

> [T]hese rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities.

Id. at 141-42. Although the Court referred to the first amendment in these three cases, *O'Brien* is the first case in which symbolic speech is analyzed in detail as an outgrowth of the first amendment.

[20]50 U.S.C. § 462(b)(3) (1965), *amending* 50 U.S.C. § 462(b)(3) (1948). The statute reads in part: "[W]ho forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon . . . ."

[21]376 F.2d 538 (1st Cir. 1967).

[22]*See* Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1 (1968).

> Despite the Warren Court's record of defending the civil liberties of the political dissenter against legislative attack, it coyly chose in this case to accept the law uncritically on its face and to avoid

was reinstated, the Court characterized the burning of a draft card as speech and applied a strict scrutiny test to determine whether the federal statute could stand.[23] The Court stated "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[24] In requiring a "sufficiently important governmental interest," the Court closely examined the federal statutes and required the Government to show a strong necessity for infringing upon the first amendment freedom. In *O'Brien*, the Court decided that the Government's responsibility to raise and support armies constituted a sufficiently compelling reason[25] for holding valid the federal statute which prohibited the burning of a draft card.[26] Thus, despite the fact that O'Brien's conviction was reinstated, this case stands as the precursor of all symbolic speech cases.

One definition of speech is "communication or expression of thoughts in spoken words."[27] A second definition is "something

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> recognition of the manifest congressional purpose. Perhaps the episode serves largely as another reminder of Justice Holmes' observation that "many things that might be said in time of peace . . . will not be endured so long as men fight."

Id. at 52. *See also* Schenck v. United States, 249 U.S. 47, 52 (1919).

[23]Strict scrutiny, as opposed to a rational basis test, involves a careful examination by the Court of the state interest. Only if the state interest is of a compelling nature will the Court accept the infringement of a basic right. The Court will apply this strict scrutiny test in cases where a suspect class or a fundamental right is involved. For cases in which the high scrutiny test was triggered by the Court's finding of a suspect class, *see, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin); Korematsu v. United States, 323 U.S. 214 (1944) (national origin). For examples of cases employing a high scrutiny test based upon fundamental rights, *see, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (freedom of association); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (right af marital privacy); NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of association); Griffin v. Illinois, 351 U.S. 12 (1956) (the right to appeal a criminal conviction).

[24]391 U.S. at 376.

[25]For further discussion and development of the compelling governmental interest doctrine, *see, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963); NAACP v. Button, 371 U.S. 415, 438 (1963); Bates v. City of Little Rock 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 464 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945).

[26]391 U.S. at 377.

[27]WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961).

that is spoken: an uttered word."[28] Speech involves the encoding and decoding of sounds verbally produced through a manipulation of one's mouth.[29] The definition of speech, however, does not include expression communicated through body language, conduct, or thought. The *O'Brien* case changed the definition of speech for constitutional purposes to include these types of nonverbal communication. It stands as a landmark of expanding the scope of the word speech, not only as interpreted by the First Congress, but also as it is used in everyday language.

The *O'Brien* case was merely a beginning for the protection of symbolic speech. The extension of the first amendment has gone beyond draft card burning to include flag desecration,[30] grooming and dress codes,[31] nude entertainment,[32] buttons and badges,[33] and musical expression.[34] In these areas the courts have found conduct with a definite message to be speech and thus protected by the first amendment guarantee. Many commentators have termed this type of conduct to be "speech-plus."[35]

In these later cases, however, the courts have employed a different level of review from the strict scrutiny applied in *O'Brien*. In the majority of cases arising subsequent to the *O'Brien* decision, the courts have only required a showing of a rational basis for state action which infringes on symbolic speech. The following discussions of flag desecration, grooming and dress codes, nude entertainment, buttons and badges, and musical expression show that the courts place symbolic speech in different strata from verbal communication.

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[28] *Id.*

[29] R. JEFFREY & O. PETERSON, SPEECH 44-46 (1971).

[30] *See* discussion of flag desecration cases at text accompanying notes 36-69 *infra*.

[31] *See* discussion of grooming and dress code cases at text accompanying notes 70-87 *infra*.

[32] *See* discussion of nude entertainment cases at text accompanying notes 88-113 *infra*.

[33] *See* discussion of buttons and badges cases at text accompanying notes 114-36 *infra*.

[34] *See* discussion of musical expression cases at text accompanying notes 137-63 *infra*.

[35] *See* KALVEN, THE NEGRO AND THE FIRST AMENDMENT 206-07 (1966); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A.L. REV. 29 (1973); Weber, *Clashing Symbols in the First Amendment Arena, The Growing Implications of Street v. New York*, 17 ST. LOUIS U.L.J. 433 (1973); Yarbrough, *Justice Black and His Critics on Speech-Plus and Symbolic Speech*, 52 TEXAS L. REV. 257 (1974).

II. Flag Desecration

Cases involving flag desecration statutes have been numerous and have generated much discussion by commentators.[36] The first and most renowned case is *Street v. New York*.[37] Mr. Street burned the American flag[38] on a New York City street corner after learning that civil rights leader James Meredith had been shot.[39] This act resulted in his arrest for violating a New York statute which prohibited desecration of the American flag.[40] At the time Street burned the flag, there were approximately forty persons observing him. Further, he could be heard saying, "If they let that happen to Meredith we don't need an American flag."[41]

Street was convicted and given a suspended sentence. The United States Supreme Court reversed the conviction of the lower courts[42] and remanded the case. In so doing the Court analyzed four lines of inquiry,[43] one of which involved whether the burning

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[36]*See, e.g.*, Mittlebeeler, *Flag Profanation and the Law*, 60 Ky. L.J. 885 (1972); Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 Wash. U.L.Q. 193 (1972); Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration*, 12 Ariz. L. Rev. 71 (1970); Comment, *Constitutional Law—Symbolic Speech—Colorado Flag Desecration Statute*, 48 Denver L.J. 451 (1972); Note, *Exploiting the American Flag: Can the Law Distinguish Criminal from Patriot?* 30 Md. L. Rev. 332 (1970); Note, *Flag Desecration—The Unsettled Issue*, 46 Notre Dame Law. 201 (1970); Note, *Flag Desecration Under the First Amendment: Conduct or Speech*, 32 Ohio S.L.J. 119 (1971); Note, *Symbolic Expression: Flag Desecration—Attitudes and the Law*, 5 Suffolk U.L. Rev. 442 (1971); Comment, *Flag Desecration Statutes in Light of United States v. O'Brien and The First Amendment*, 32 U. Pitt. L. Rev. 513 (1971); Note, *Flag Desecration: A Constitutionally Protected Activity?*, 7 U. San Francisco L. Rev. 149 (1972); 5 Akron L. Rev. 157 (1972); 22 Case W. Res. L. Rev. 555 (1971); 1970 Wash. U.L.Q. 517 (1970); 73 W. Va. L. Rev. 179 (1970).

[37]394 U.S. 576 (1969).

[38]Appellant burned a 48 star American flag which he had displayed on national holidays. A possible argument for the appellant, unmentioned in the case, is that in 1966 a 48 star flag was not the American flag. Alaska and Hawaii, the 49th and 50th states respectively, were admitted in 1959.

[39]394 U.S. at 578.

[40]This statute makes it a misdemeanor "publicly to mutilate, deface, defile, or defy, trample upon or cast contempt upon either by words or act any flag of the United States." N.Y. Penal Law § 1425, subd. 16, par. d (1909). In 1967, § 1425, subd. 16, was superseded by § 136 of the General Business Law, which in par. d defines the offense in similar language. *See* N.Y. Gen. Bus. Law § 136 (McKinney 1968).

[41]394 U.S. at 579.

[42]20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967).

[43]The four lines of inquiry examined by the Court were:

> (1) whether the constitutionality of the "words" part of the statute was passed upon by the New York Court of Appeals; (2) whether, if appellant's conviction may have rested in whole or in part on his utterances and if the statute as thus applied is unconsti-

of the flag is a form of expression entitled to protection. The Court noted that a conviction on the words alone could not be upheld, because Street was not inciting anyone to do any unlawful act.[44] Nor could a conviction be justified on the possible tendency of appellant's words to provoke violent retaliation.[45] Further, the conviction could not be sustained on the premise that the words used by appellant would likely shock passersby.[46] This left the issue of whether the burning of the flag was a form of expression protected by the Constitution. On this issue, the Court concluded that although disrespect for the flag should be deplored, it was necessary to see whether there was an infringement of the constitutional guarantee of "freedom to be intellectually . . . diverse or even contrary" and the "right to differ as to things that touch the heart of the existing order."[47] Since Street's conviction may have rested upon his words rather than the burning of the flag, it could not be upheld.[48]

If faced with a flag desecration case in 1971 or 1972 one could best predict the result by tossing a coin.[49] Jurisdictions differed on

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tutional, these factors in themselves require reversal; (3) whether Street's words may in fact have counted independently in his conviction; and (4) whether the "words" provision of the statute, as presented by this case is unconstitutional.

394 U.S. at 581.

[44]*Id.* at 591. *See also* Yates v. United States, 354 U.S. 298, 318-19 (1957); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

[45]394 U.S. at 592. *See also* Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942), in which the "fighting words" doctrine is discussed.

[46]394 U.S. at 592. *See also* Cox v. Louisiana, 379 U.S. 536, 546-52 (1965); Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[47]394 U.S. at 593.

[48]In a strong dissent, Justice Fortas claimed the flag to be a special kind of personalty. He said, "Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest." *Id.* at 617. The other justices dissenting were Warren, Black, and White. *See* Weber, *Clashing Symbols in the First Amendment Arena, The Growing Implications of Street v. New York*, 17 ST. LOUIS U.L.J. 433 (1973).

> Finally, destruction of symbols is serious business akin to book burning. It tears away at the shared basic meaning structure of a nation's people which makes democracy possible. It does this precisely by bypassing rational discourse about political issues. Harlan was admirable in his desire to protect this individual; he was wise and a more realistic defender of first amendment freedoms than Black, Fortas, or Warren in his refusal to set a precedent before the issue had matured. But he missed the import of the symbolic expression issue.

Id. at 455.

[49]*See* Note, *The Flag Defilement Statutes Defiled*, 5 MEMPHIS ST. U.L.

whether the enforcement of a flag desecration statute was based upon a legitimate state interest. For example, in *Radich v. New York*,[50] the United States Supreme Court affirmed the defendant's conviction for displaying in his art gallery a sculpture depicting "the flag . . . in the form of the male sexual organ, erect and protruding from the upright member of a cross."[51] Although the sculptures involved were alleged to be a protest against the Vietnam War, the Court did not permit the first amendment argument to prevail.[52] In a case involving a defendant who wore an American flag vest,[53] the Court affirmed the conviction under the California desecration statute[54] because the defendant had failed to show "a recognizable communicative aspect" in the wearing of the vest.[55] Yet in another flag-vest case with a similar statute, the Second Circuit found the statute void for overbreadth.[56]

The two leading cases of 1974, *Smith v. Goguen*[57] and *Spence v. Washington*,[58] failed to clarify the discrepancies in prior decisions. In the *Smith* case, the defendant had worn trousers which had a small United States flag sewn to the seat. He was convicted of violating a Massachusetts statute,[59] which made it a crime to treat the United States flag with contempt in public. The Court in this case failed to reach the first amendment issue and

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REV. 396 (1975). The author of this law review note summarized the status of flag desecration cases in the statement:

> It appears that flag-wearing may or may not be 'symbolic speech' per se; nevertheless, adornment with the 'Stars and Stripes' is protected, no matter how debased the position of the flag might be on one's apparel. If the banner is in any way adjunct to an expression of opinion, its use is protected by the First Amendment, no matter how insulting such use may be. The only exception is that if violent response is forthcoming from the public, or an intent to debase the flag can be proven, then a defilement conviction may be upheld.

Id. at 405.

[50]401 U.S. 531 (1971), *aff'g per curiam by an equally divided Court* 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970).

[51]26 N.Y.2d at 117, 257 N.E.2d at 31, 308 N.Y.S.2d at 847.

[52]The decision was 4-4, and thus the lower court was affirmed. Justice Douglas did not participate in the decision.

[53]People v. Cowgill, 274 Cal. App.2d 923, 78 Cal. Rptr. 853 (1969), *appeal dismissed*, 396 U.S. 371 (1970).

[54]The California statute read that a person was guilty of a misdemeanor who "publicly mutilates, defaces, defiles or tramples upon any . . . flag (of the U.S.)". CAL. MIL. AND VET. CODE § 614(d) (West 1955). The statute was declared unconstitutional in 1970, after the decision in *Cowgill*.

[55]396 U.S. at 371.

[56]Thoms v. Smith, 334 F. Supp. 1203 (D. Conn. 1971), *aff'd sub nom.* Thoms v. Hefferman, 473 F.2d 478 (2d Cir. 1973).

[57]415 U.S. 566 (1974).

[58]418 U.S. 405 (1974).

[59]MASS. GEN. LAWS ANN. ch. 264, § 5 (1968).

affirmed the district court's decision[60] that the Massachusetts statute was unconstitutionally vague and overbroad.[61] However, Justice Powell's opinion implied that a law which punished mistreatment of the flag could be valid. He stated that "certainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags."[62]

In the *Spence* case, defendant hung a United States flag from the window of his apartment in Seattle, Washington. The flag was upside down, and a peace symbol was attached to the front and back.[63] The defendant was arrested for violating Washington's improper flag use statute, which prohibits placing "any word, figure, mark, picture, design, drawing or advertisement" upon a flag of the United States or the State of Washington.[64] Unlike *Smith*, the Court in this case reached the first amendment issue, but in doing so took a position contrary to the one presented by Justice Powell in *Smith*. The per curiam decision[65] in *Spence* rested upon a recognition of communicative connotations from the use of flags.[66] It was clear that the defendant intended to convey a particularized message and it was likely that a viewer would understand that message.[67] Thus, the prohibition of this message would conflict with the first amendment's guarantee of free expression.[68]

Where flag desecration statutes stand today is uncertain.[69] If one looks solely to the last Supreme Court decision, *Spence*, then it would appear that a defendant with a clear message would prevail on a freedom of expression basis if he desecrated his own personal flag. However, Justice Powell's statements in *Smith*, and prior cases suggest that states do have a legitimate interest in protecting the United States flag. It is conceivable that a future court will distinguish the *Spence* case from *Smith* and prior decisions by holding that a defendant's right to freedom of expression is only applicable if the desecration is performed within one's

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[60]471 F.2d 88 (1st Cir.), *aff'g* 343 F. Supp. 161 (D. Mass. 1972).

[61]415 U.S. at 567.

[62]*Id.* at 581-82.

[63]418 U.S. at 406.

[64]WASH. REV. CODE ANN. § 9.86.020 (1961).

[65]Justices Blackmun and Douglas concurred in the result. Chief Justice Burger and Justices Rehnquist and White dissented.

[66]The Court stated: "On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol." 418 U.S. at 410.

[67]*Id.* at 411.

[68]*Id.* at 415.

[69]*See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

own home. Although *Spence* deals extensively with freedom of expression as a first amendment guarantee, it can easily be limited as a right to express freely and do as one pleases only in one's own home. The confusion of this area leaves open for courts a variety of possible resolutions in future flag desecration cases.

III. Grooming and Dress Codes

Symbolic speech has also been dealt with in cases involving grooming and dress codes.[70] The issue presented is whether wearing a specific hair style, such as long hair, or a type of dress, such as the mini skirt, is a form of expression protected by the first amendment.[71] With regard to hair length codes, the courts lean toward accepting them as legitimate regulations.[72] The invalidations which have been made have resulted from the courts' finding alternative rationales for unconstitutionality other than freedom of expression.[73] The problem with using the first amendment in

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[70]*See, e.g.*, Note, *The Schools Versus the Long Hairs: An Exercise In Legal Gobbledygook*, 1971 Wash. U.L.Q. 89; 38 Brooklyn L. Rev. 802 (1972); 38 Tenn. L. Rev. 593 (1971).

[71]Prior to the *O'Brien* case, leading constitutional authority Alexander Meiklejohn discussed at length speech in relation to action. He concluded that:

> The distinction between speech-actions and speech-thoughts is not, then, the distinction which we need for the proper interpretation of the First Amendment. The fire-shouting illustration given by Mr. Holmes tells us of one type of action, viz., criminal action, which is not protected by the principle of freedom of speech. It does not follow that all speech-acts are to be denied the freedom guaranteed by that principle.

A. Meiklejohn, Political Freedom 40 (1965).

[72]*See, e.g.*, New Rider v. Board of Educ., 480 F.2d 693 (10th Cir. 1973); Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972); Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972); King v. Saddleback Jr. College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972); Rumler v. Board of School Trustees, 327 F. Supp. 729 (D.S.C. 1971); Jeffers v. Yuba City Unified School Dist., 319 F. Supp. 368 (E.D. Cal. 1970); Carter v. Hodges, 317 F. Supp. 89 (W.D. Ark. 1970); Livingston v. Swanquist, 314 F. Supp. 1 (N.D. Ill. 1970); Brownlee v. Board of Educ., 311 F. Supp. 1360 (E.D. Tenn. 1970); Brick v. Board of Educ. 305 F Supp. 1316 (D. Colo. 1969); Montalvo v. Madera Unified School Dist. Bd. of Educ., 21 Cal. App. 3d 323, 98 Cal. Rptr. 593 (1971).

[73]*See, e.g.*, Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972) (due process); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972) (due process); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971) (9th Amendment); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) (due process); Sear v. Mertz, 338 F. Supp. 945 (M.D. Pa. 1972) (due process); Berryman v. Hein, 329 F. Supp. 616 (D. Idaho 1971) (due process); Axtell v. LaPenna, 323 F. Supp. 1077 (W.D. Pa. 1971) (due process); Martin v. Davison, 322 F. Supp. 318 (W.D. Pa. 1971) (due process); Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969) (equal protection); Sims v. Colfax Community School Dist., 307 F. Supp. 485 (S.D. Iowa 1970)

such cases appears to be in finding that there is a message that can be expressed and interpreted from hair length and style.[74] With respect to dress codes, the decisions are numerous and conflicting. The conflicts within the courts with respect to dress and grooming codes result in what has been termed "legal gobbledygook."[75]

On the side of permitting the regulations is the argument of avoiding decline of academic performance.[76] Other interests include health,[77] safety,[78] aesthetic considerations,[79] and discipline problems.[80] The students contesting dress and grooming codes have used a wide variety of arguments. These include: equal protection,[81] due process (expulsion without proper procedural safeguards),[82] due process (vagueness),[83] the right to privacy,[84] the ninth amendment right,[85] and, finally, the right to free speech.[86]

The freedom of speech argument is tenuous. The problem remains that a style of dress or hair, although a means of conveying the message that a person is a part of the counterculture, a "hippie," or revolutionary, does not convey a specific message to the observer sufficient to qualify as communication, other than classifying the individual in a category. In addition to the lack of communication on a particular subject, there seldom exists an

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(due process); Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969) (equal protection).

[74]*See* Comment, *The Legality of Dress Codes for Students*, 20 DE PAUL L. REV. 222 (1971).

[75]Note, *The Schools Versus the Long Hairs: An Exercise In Legal Gobbledygook*, 1971 WASH. U.L.Q. 89.

[76]*See* Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970); Reichenberg v. Nelson, 310 F. Supp. 248 (D. Neb. 1970).

[77]*See, e.g.*, Bishop v. Colaw, 316 F. Supp. 445 (E.D. Mo. 1970); Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969).

[78]*See, e.g.*, Gfell v. Rickelman, 313 F. Supp. 364 (N.D. Ohio 1970); Cash v. Hoch, 309 F. Supp. 346 (W.D. Wis. 1970).

[79]*See, e.g.*, Brownlee v. Board of Educ., 311 F. Supp. 1360 (E.D. Tenn. 1970).

[80]*See, e.g.*, Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969); Prichard v. Spring Branch Independent School Dist., 308 F. Supp. 570 (S.D. Tex. 1970).

[81]*See* Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969).

[82]*See, e.g.*, Dixon v. Board of Educ., 294 F.2d 150 (5th Cir. 1961); Davis v. Ann Arbor Pub. Schools, 313 F. Supp. 1217 (E.D. Mich. 1970); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969).

[83]*See* Gfell v. Rickelman, 313 F. Supp. 364 (N.D. Ohio 1970).

[84]*See* Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

[85]*See* Comment, *The Legality of Dress Codes for Students*, 20 DE PAUL L. REV. 222, 234 (1971).

[86]*See, e.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Jeffers v. Yuba City Unified School Dist., 319 F. Supp. 368 (E.D. Cal. 1970).

intentional meaning that the speaker is attempting to convey. If there is no communication of a specific message, there is no first amendment ground for opposing suppression of nonspeech activities. The first amendment prohibits state regulation of such activities only when there is communication of a specific message and the state's purpose is to suppress the communication.[87]

IV. Nude Entertainment

A third aspect of symbolic speech centers around cases involving nude entertainment. One of the first cases to discuss nonverbal conduct in this field is *California v. LaRue*.[88] The first amendment freedom of expression was weighed against the twenty-first amendment privilege to control the manner and circumstances under which liquor is dispensed, and the twenty-first amendment prevailed.[89] The Court looked solely for a rational basis to uphold the California Department of Alcoholic Beverage Control Regulations.[90] Appellant Kirby, Director of the Department of Alcoholic Beverage Commission, opposed the "sexual conduct between dancers and customers" resulting from "topless" and "bottomless" dancing.[91] To curtail the increased prostitution and corruption, the Department instituted rules prohibiting certain conduct. The district court found many of these rules to be unconstitutional.[92]

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[87]*See* United States v. O'Brien, 391 U.S. 367 (1968); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A.L. Rev. 29, 38-39 (1974).

[88]409 U.S. 109 (1972).

[89]Repeal of Prohibition Amendment

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

U.S. Const. amend. 21.

[90]California Dep't. of Alcoholic Beverage Control Regulations—Rules 143.3 and 143.4 (Aug. 10, 1970).

[91]409 U.S. at 110-11.

[92]326 F. Supp. 348, 358 (1971). The court found the portions of the statute which regulated the content of the live entertainment did not satisfy the *O'Brien* test or the Supreme Court's obscenity tests. Those portions of the regulations found unconstitutional were:

(a) The performance of acts, or simulated acts, of 'sexual intercourse, masturbation, sodomy, beastiality, oral copulation, flagellation or any sexual acts which are prohibited by law';

In reversing the district court's decision, the Supreme Court discussed the role of expression where conduct and not speech is involved. The majority commenced by quoting *Schact v. United States*[93] in which the Court had held that "[a]n actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance."[94] However, the Court then went on to qualify this broad language. It noted that according to *O'Brien,* constitutional protection of an individual's conduct is limited to situations when a "communicative element" is present.[95] Although the *LaRue* Court found that some of these regulations were within the limits of the constitutional protection of freedom of expression, it noted that the California Alcoholic Beverage Board did not completely forbid these performances.[96] The crucial factor was that the performances were in establishments with licenses to sell liquor.[97] Restriction of nude entertainment was thus rationally linked to the right of the board to control the serving of liquor under the twenty-first amendment.[98]

In the *LaRue* case, as in the original flag desecration cases[99] the Court found that freedom of expression was a valid interest of an individual but not to the extent of being a fundamental right. Thus, although "free speech" is considered a fundamental right, when conduct alone is involved the courts will be satisfied if a rational basis for the state's action is found.[100]

(b) The actual or simulated 'touching, caressing or fondling on the breast, buttocks, anus or genitals';

(c) The actual or simulated 'displaying of the pubic hair, anus, vulva or genitals';

(d) The permitting by a licensee of 'any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus'; and, by a companion section,

(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above.

California Dep't of Alcoholic Beverage Control Regulations—Rules 143.3 and 143.4 (Aug. 10, 1970). For a complete listing of the regulations involved, see 326 F. Supp. at 358-60.

[93]398 U.S. 58 (1970).

[94]*Id.* at 60.

[95]"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968).

[96]409 U.S. at 118.

[97]*Id.*

[98]*Id.* at 118-19.

[99]*See* text accompanying note 36 *supra.*

[100]This rational basis test was elaborated upon in the decision of Crownover v. Musick, 9 Cal.3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973). In a factual situation similar to that found in *LaRue*, the court concluded that the

The most recent case involving nude entertainment, *Doran v. Salem Inn, Inc.*,[101] indicates the Court may apply a strict scrutiny test to statutes which regulate such activities in places which do not serve liquor. The plaintiffs in *Doran* were bar operators who provided entertainment in the form of topless dancing for their customers.[102] The Town of North Hempstead, New York, passed a local law which prohibited this form of nude entertainment in any public place.[103] The district court issued a preliminary injunction, finding the statute to be an infringement of the first amendment, because it applied to public places other than bars and thus was overbroad.[104] Since no question of obscenity was at stake there was no rationale for maintaining the statute.[105] The court further reasoned that if this ordinance were maintained then the "Ballet Africains" and "Hair" would be prohibited.[106]

The invalidation of the North Hempstead ordinance was affirmed by the United States Court of Appeals for the Second Circuit.[107] The court distinguished this strict approach from that of *LaRue*. In *LaRue*, the Supreme Court upheld a regulation forbidding the sale of liquor by the drink where sexually provocative entertainment was performed. But the Second Circuit specifically noted that the statute involved in the *LaRue* case did not forbid all nude performances "across the board," but only those in places serving liquor. The North Hempstead statute in the *Doran* case was an "across the board" type statute prohibiting nude entertainment regardless of whether a bar was involved, and as such was clearly an infringement upon freedom of speech.[108]

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case did not involve either a "suspect class" or a "fundamental right." As such the rules were valid under the police power. Present was a rational relationship to the conceivable governmental purpose of furthering "public order, morals and welfare." *Id.* at 415, 509 P.2d at 514, 107 Cal. Rptr. at 691.

[101]422 U.S. 922 (1975).

[102]*Id.* at 924.

[103]Town of North Hempstead Local Law No. 1-1973 enacted July 17, 1973. The district court summarized the regulation as follows:

> [M]aking it unlawful (i) for any person conducting or operating any bar, lounge or other public place to permit a waitress, bar maid or entertainer to appear with uncovered breasts, or (ii) for any person to appear in any bar, lounge or public place with uncovered breats (sic) or to appear in any entertainment or sketch with uncovered breasts. The maximum penalty for a violation is a fine of $500 or imprisonment for fifteen days, or both, each day's violation constituting a separate violation.

364 F. Supp. 478, 479-80 (E.D. N.Y. 1973).

[104]364 F. Supp. at 483.

[105]Nudity is not per se obscene, even as to minors. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

[106]364 F. Supp. at 483.

[107]501 F.2d 18 (2nd Cir. 1974).

[108]*Id.* at 20-21.

One of the three *Doran* plaintiffs, M & L, had disobeyed the North Hempstead ordinance and had been prosecuted shortly after the action was filed in the district court. The Supreme Court held that *Younger v. Harris*[109] and its progeny required dismissal of the action as to M & L. However, it held that *Younger* did not compel dismissal as to the other two plaintiffs, Salem Inn and Tim-Rob.[110] The first amendment analysis in *Doran* is limited to a discussion of whether the district court abused its discretion in granting a preliminary injunction based on a likelihood the plaintiffs would succeed on the merits—whether the statute was likely to be declared unconstitutional.[111] The Court agreed with the district court that the North Hempstead statute could restrict protected activity:

> [E]ven though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression . . . .[112]

The North Hempstead statute was not limited to activities which could constitutionally be restricted under *LaRue*, but also included other activities without any governmental interest to counterbalance the constitutional infringement. It was, therefore, the fact that the prohibition of nude dancing was not limited to places that serve liquor which made it overbroad.[113]

Thus, although the courts seem to be moving toward finding a fundamental right of expression, they leave open the option of applying a rational basis test when a statute includes an element protected by another constitutional amendment. The significance of nude entertainment as a whole in relation to symbolic speech is that as in flag desecration and groming and dress code cases, the courts have again interpreted the word speech to include an item that is pure conduct without any verbal elements.

D. Buttons and Badges

Buttons and badges have also been deemed to be a form of expression, and thus courts have examined restrictions of such expression in light of the first amendment. However, as in other areas of symbolic speech, in cases involving buttons and badges a mere rational basis will be sufficient to validate a statute or rule.

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[109]401 U.S. 37 (1971). *See also* Steffel v. Thompson, 415 U.S. 452 (1974); Samuels v. Mackell, 401 U.S. 66 (1971).

[110]422 U.S. at 930.

[111]*Id.* at 932-34.

[112]*Id.* at 933.

[113]*Id.* at 933-34.

The best-known case in this area of nonverbal communications is *Tinker v. Des Moines Independent Community School District.*[114] Three petitioners, junior high and high school students, wore black armbands to school in opposition to the Vietnam War.[115] The policy of the school was that anyone wearing an armband would be asked to remove it and if he failed to do so he would be suspended until he returned without the armband.[116]

When the three students were suspended from school they brought an action in the United States District Court.[117] The court held for the school authorities on the basis that the regulation was reasonable in order to maintain discipline in the school,[118] and the Eighth Circuit affirmed.[119]

The United States Supreme Court reversed these lower courts in a decision employing the first amendment. The Court discussed at great length the link between passive expression and the guarantee of freedom of speech.[120] It concluded that the first amendment permitted "reasonable regulation of speech-connected activities in carefully restricted circumstances."[121] However, to meet the test it was necessary to show the existence of a reasonable state interest. In this case the record did not show a rationale which might have justified the claimed state interest of preventing disruption caused by armbands. In delivering the majority opinion, Justice Fortas stated that "clearly the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork and discipline, is not constitutionally permissible."[122]

At first glance the *Tinker* case appears to be quite broad in its interpretation of free speech. It emphasized the fact that the students were passive in their approach, and that they neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. The only activism that resulted from these students' form of opposition to the Vietnam War was increased discussion outside of the classroom.[123] However, in empha-

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[114]393 U.S. 503 (1969).

[115]The three petitioners were 13, 15, and 16 years old. They were fully aware of the school regulation that opposed the wearing of armbands in school.

[116]393 U.S. at 504.

[117]The action was brought through the students' fathers under 42 U.S.C. § 1983 (1970). 258 F. Supp. 971 (1966).

[118]393 U.S. at 505.

[119]383 F.2d 988 (1967).

[120]393 U.S. at 508.

[121]*Id.* at 513.

[122]*Id.* at 511.

[123]*Id.* at 514.

sizing the students' passive conduct the Court did limit the scope of the concept of a guaranteed first amendment right to freedom of expression.[124] It held that symbolic speech in the schools is protected only when it is nondisruptive as in the form of a silent protest.[125]

These words of limitation were the basis for a subsequent decision, *Guzick v. Drebug*.[126] The regulations of Shaw High School in Ohio prohibited the wearing of any symbols not related to school activities.[127] Plaintiff, an 11th grader, wore an anti-Vietnam War button to school. When he failed to remove the button he was suspended from school. The district court stated, "We are at once aware that unless *Tinker* can be distinguished, reversal is required. We consider that the facts of this case clearly provide such distinction."[128] In this case, the state's interest in providing an atmosphere conducive to learning prevailed. Although the Sixth Circuit conceded that the buttons were a form of expression, it noted that "unless they have some relevance to what is being considered or taught, a school classroom is no place for the untrammeled exercise of such right."[129] One interesting point to note in the *Guzick* case is the fact that the court specifically stated that it is not necessary to have good order demolished to be permitted to establish rules.[130] It was sufficient that there was a likelihood of disorder.[131]

Another case subsequent to *Tinker* also managed to establish a sufficient state interest to prevail over the first amendment. In

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[124]*See, e.g.*, Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Haskell, *Student Expression in the Public Schools*: Tinker *Distinguished*, 59 GEO. L.J. 37 (1970); Note, *The Emerging Law of Students' Rights*, 23 ARK. L. REV. 619 (1970).

[125]393 U.S. at 514. *See also* Note, *Teachers' Freedom of Expression Outside the Classroom: An Analysis of the Application of* Pickering *and* Tinker, 8 GA. L. REV. 900 (1974); Note, *Symbolic Speech, High School Protest and the First Amendment*, 9 J. FAMILY L. 119 (1969); Note, *Free Speech and the Hostile Audience*, 26 N.Y.U.L. REV. 489 (1951). The note analyzing the application of *Pickering* and *Tinker* summarized the effect of these cases when a teacher's expression is involved: "The effect of these decisions is to protect teacher expression unless it has interfered, or could reasonably have been expected to interfere, with normal school functioning." 8 GA. L. REV. at 917.

[126]431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

[127]*Id.* at 595.

[128]*Id.* The district court denied plaintiff's application for a preliminary injunction and dismissed the complaint. 305 F. Supp. 472 (N.D. Ohio 1969).

[129]431 F.2d at 600-01.

[130]*Id.* at 600.

[131]The court noted the prior rebelliousness of the students as support for its decision. *Id.*

Slocum v. Fire & Police Commission[132] the Appellate Court of Illinois held that a police officer could be required to wear an American flag emblem on the sleeve of his uniform.[133] Further, a failure to comply with this police commission regulation was sufficient grounds for a suspension.[134] The court rationalized the infringement on the first amendment on the basis of the state's interest in developing a sense of loyalty to the nation.[135]

Both *Slocum* and *Guzick* provide limitations of *Tinker* through factual distinctions. Whether a button or badge will receive the first amendment's guarantee is based upon whether the governmental interest is reasonably linked to the regulation.[136] If so, the court will likely validate the statute.

E. Musical Expression

On March 5, 1971, the Federal Communications Commission (FCC) issued a public notice entitled "Licensee Responsibility to Review Records Before Their Broadcast."[137] This first notice was a result of complaints received by the FCC that the lyrics of songs being broadcast related to drugs.[138] The action taken aimed to alleviate the alleged problem through a policing of broadcasting by licensees.[139] When confusion arose as to exactly what responsibilities were placed upon the licensees by this first notice, a second notice of explanation was issued by the Commission.[140] The essence

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[132] 8 Ill. App. 3d 465, 290 N.E.2d 28 (1972).

[133] *Id.* at 467, 290 N.E.2d at 30.

[134] *See* 6 Creighton L. Rev. 264 (1972).

[135]

> The flag does, however, tend to develop a sense of loyalty to nation. We regard this as an important governmental interest. Since a municipality has the power to prescribe a uniform for its police force, and since display of the flag tends to promote an important governmental interest, a flag emblem may be made a part of the uniform.

8 Ill. App. 3d at 469, 290 N.E.2d at 33.

[136] *See* 45 N.Y.U.L. Rev. 1278 (1970).

[137] 36 Fed. Reg. 4901 (1971).

[138] *See* Fifer, *Musical Expression and First Amendment Considerations*, 24 DePaul L. Rev. 143 (1974).

[139]

> In short, we expect broadcast licensees to ascertain, before broadcast, the words or lyrics of recorded musical or spoken selections played on their stations. Just as in the case of the foreign-language broadcasts, this may also entail reasonable efforts to ascertain the meaning of words or phrases used in the lyrics. While this duty may be delegated by licensees to responsible employees, the licensee remains fully responsible for its fulfillment.

36 Fed. Reg. 4901 (1971).

[140] 36 Fed. Reg. 8090 (1971).

of this notice was that the licensees had an affirmative responsibility to be aware of the contents of records played and to judge the records' suitability.[141] From these two notices have arisen cases presenting the constitutional question of whether the FCC action is an abridgement of freedom of speech.[142]

The issue presented in these cases is whether one can equate music with speech. It has been stated that "a work of pure music can express and—more importantly—*convey* feeling and emotion."[143] In conveying meaning, music is essentially the same as concepts that are expressed in words. Finding music within the scope of the first amendment can be further justified by the fact that so many other items such as films and parades have been granted protection.[144] Those who feel that music is not comparable

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> (1) That the First Notice should not have been construed to be a direct prohibition of any particular type of record, but rather that the Commission's only direct imposition of will would occur in the renewal context;
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> (2) that there would be no active reprisals;
>
> (3) that there nevertheless did exist an affirmative responsibiilty on the part of licensees to
>
> (a) know a record's contents
>
> (b) judge the record's suitability for broadcast, and
>
> (c) be prepared to sink or swim by these decisions at renewal time.

Id. at 8090-91.

[142]*See* Comment, *Drug Songs and the Federal Communications Commission*, 5 U. MICH. J.L. REFORM 334 (1972).

[143]Fifer, *supra* note 138, at 161.

[144]*See, e.g.*, Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (labor activities); Cox v. Louisiana, 379 U.S. 536 (1965) (parades and demonstrations); Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) (films); Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957) (picketing); Terminiello v. Chicago, 337 U.S. 1 (1949) (public speeches); Saia v. New York, 334 U.S. 558 (1948) (use of sound tracks); Martin v. City of Struthers, 319 U.S. 141 (1943) (solicitation); National Broadcasting Co. v. U.S., 319 U.S. 190 (1943) (broadcasting); United States v. One Book Entitled "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934) (book). An historical argument can be noted to show the diversity intended for the first amendment. Leading constitutionalist Zachariah Chafee, Jr. states:

> If 'speech' is limited . . . so is 'press'. Yet that is impossible in view of the address of the Continental Congress in 1774 to the people of Quebec, in which freedom of the press, in addition to its political values, is said to be important for 'the advancement of truth, science, morality and arts in general'. . . .
>
> Moreover, the framers would hardly have relegated science, art, drama, and poetry to the obscure shelter of the Fifth Amendment, . . . inasmuch as 'due process' meant mainly proper procedure until the middle of the nineteenth century.

Chafee, Book Review, 62 HARV. L. REV. 891, 897 (1947).

to speech state that although the lyric portion of a musical composition is clearly speech, the combination of lyric and music together is not susceptible of first amendment protection.[145] This argument is further strengthened by noting the impact that broadcasting has on the public, therefore justifying more careful regulation.[146]

The argument reached its height in *Yale Broadcasting Company v. Federal Communications Commission.*[147] Appellant, a radio station licensee, argued that the two notices were an unconstitutional burden on the first amendment right to free speech.[148] He compared this case to *Smith v. California,*[149] in which the Supreme Court reversed a bookseller's conviction of possession and sale of obscene literature on the basis that although the state might have a legitimate interest in restricting obscenity, it could not accomplish its goal by placing on the bookseller the procedural burden of examining every book contained within his store. The D.C. Circuit, however, distinguished the *Yale* case from the *Smith* case. The reasoning was that while a bookstore might contain thousands of hours' worth of reading material, a broadcaster would have a maximum of 24 hours' worth of material to check each day.

A second contention on the part of the *Yale* appellant in opposition to the notices requiring a licensee to police the broadcasts, was that so many of the lyrics in songs are obscure and ambiguous.[150] He noted how many modern songs were virtually unintelligible and filled completely with meaningless gibberish. The court conceded the validity of this argument, but claimed that this should not prevent a broadcaster from having some knowledge of the contents of the music. The court stated that the licensees should be required to make at least a reasonable effort to know what was

[145]Fifer, *supra* note 138, at 159.

[146]*Id.* at 157. Two other arguments presented justifying the regulation of broadcasting by licensees were that a broadcast license is a matter of privilege, not right; and that only a limited number of licenses can be issued, thus the existence of a fairness doctrine. *See also* Barrow & Manelli, *Communications Technology—A Forecast of Change, Part I,* 34 LAW & CONTEMP. PROB. 205 (1969); Levin, *The Radio Spectrum Resource,* 11 J. LAW & ECON. 433 (1968); Comment, *The First Amendment and Regulation of Television News,* 72 COLUM. L. REV. 746, 763 (1972).

[147]478 F.2d 594 (D.C. Cir. 1973). (Appeal to review a notice and order issued by the FCC.)

[148]*Id.* at 595. The appellant also argued in the alternative that the notices imposed new duties on licensees and were therefore to be the subject of rule-making procedures. A final allegation by the appellant was that the requirements specified in the notices were impermissibly vague and that the FCC had abused its discretion in refusing to clarify its position. *Id.*

[149]361 U.S. 147 (1959).

[150]478 F.2d at 598.

in the "canned music": "No producer of pork and beans is allowed to put out on a grocery shelf a can without knowing what is in it and standing back of both its contents and quality."[151]

The licensees appealed the circuit court's decision to the Supreme Court.[152] Certiorari was denied but with an eloquent dissent by Justice Douglas. Justice Douglas equated music with speech on the basis of a message emanating from the song.[153] He stated that "songs play no less a role in public debate, whether they eulogize the John Brown of the abolitionist movement, or the Joe Hill of the union movement, provide a rallying cry such as 'We Shall Overcome', or express in music the values of the youthful 'counterculture.' "[154] He felt it would be inconsistent with the first amendment to require a broadcaster to censor its music.[155]

A later case, *Citizens Committee to Save WEFM v. Federal Communications Commission*,[156] involved an appeal by a citizen's group from orders of the FCC approving assignment of a license for a radio station as well as the new licensee's proposal to change the entertainment format of the station from classical to contemporary music.[157] In the case, the application of music to the first amendment was discussed in detail. The court noted that in addition to its artistic value, music can be an important mode of political and moral expression.[158] If there is regulation of what can and cannot be put on the air, it is possible that lyrics of popular songs which communicate controversial ideas will be repressed.[159] On the other hand, there is the possibility that through government regulation of broadcasting an enhanced variety of political and cultural viewpoints may be heard.[160] In this case the court concluded that it was impossible to resolve the conflict between diversity of viewpoints provided through controls, and freedom from regulation. Thus, it balanced the two views and elected to

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[151] *Id.* at 599. The court recapitulated its views on the first amendment issue by stating that it was not expressing a value judgment on the style of music produced. It merely felt that the licensee had the responsibility to evaluate the music being broadcast. *Id.*

[152] 414 U.S. 914 (1973).

[153] *Id.* at 917.

[154] *Id.* at 918.

[155] *Id. See, e.g.*, Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 148 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Lamont v. Postmaster General, 381 U.S. 301, 309 (1965).

[156] 506 F.2d 246 (D.C. Cir. 1974).

[157] *Id.* at 249.

[158] *Id.* at 251.

[159] *Id.*

[160] *Id. See* Associated Press v. United States, 326 U.S. 1 (1945); Brandywine-Main Line Radio, Inc., 473 F.2d 16 (D.C. Cir. 1972).

minimize regulation except when diversity was most seriously threatened.[161]

Music as an aspect of the first amendment's guarantee of free speech is therefore a new concept. An outgrowth of the FCC's 1971 regulations, it has expanded to many areas of broadcasting. In the cases that have discussed the issue of whether music can be equated with speech, the courts have held it to be within the scope of the first amendment. However, in the *Yale* and *WEFM* cases the courts balanced the FCC interest with the licensee's or citizen's interest and found the FCC to prevail. In light of the courts' decisions one can question whether the first amendment was being truly enforced as it should be. If the courts were in fact abiding by the first amendment, it would follow that they would not accept merely the rational basis for the regulation given by the FCC. The first amendment's guarantee of free speech is a fundamental right[162] and would therefore require the court to find a compelling rationale for usurping it.[163] Yet both the *Yale* and *WEFM* cases fail to mention the need for a compelling interest for upholding the FCC regulations. In both of these cases, the courts accepted the governmental interest despite the fact that it resulted in an infringement of the first amendment right to freedom of speech.

CONCLUSION

Freedom of speech became a written reality in 1791.[164] Since then it has been limited in many ways through cases in areas which the courts have held to be permissible subjects of regulation.[165] Only one area, however, has benefited through time. Symbolic speech or nonverbal conduct was virtually an unknown doctrine until 1967.[166] With the counterculture,[167] revolutions[168] and student dissent, came a penumbra to freedom of speech—freedom of expression.

At first, nonverbal expression was afforded the same protection as in other free speech cases.[169] This protection, however, proved to be too broad for future courts. With the end of the

[161]506 F.2d at 252.

[162]*See* note 25 *supra*. *See also* Police Department v. Mosley, 408 U.S. 92 (1972) (expression of an opinion as a fundamental right).

[163]*See* Stroud, *Sex Discrimination in High School Athletics*, 6 IND L. REV. 661, 665 (1973).

[164]See note 1 *supra*.

[165]*E.g.* obscenity, loudspeakers, hostile audiences, subversiveness, captive audiences, and slander. See notes 13-18 *supra*.

[166]See text accompanying notes 19-26 *supra*.

[167]T. ROSZAK, THE MAKING OF A COUNTERCULTURE (1969).

[168]H. MARCUSE, ONE-DIMENSIONAL MAN 1-123 (1964); C. REICH, THE GRENING OF AMERICA 3-21, 299-349 (1970).

[169]See text accompanying notes 19-26 *supra*.

Warren Court came the limitations to *O'Brien's* holding that symbolic speech is a fundamental right subject only to compelling state interests.[170] The limitations came in the areas of flag desecration,[171] dress and grooming codes,[172] nude entertainment,[173] buttons and badges,[174] and musical expression.[175] They came as factual distinctions to *O'Brien* and as decisions which completely ignored the need for a substantial state interest. With these cases came the court's general rule of merely finding a rational basis for sustaining the legislation or regulation.

Where do we stand today? In constitutional law, questions such as these can never be answered. For as easily as *O'Brien* was created it could be destroyed. At one extreme we have *O'Brien* and at the other is the failure to recognize any conduct as speech. Emerson noted the need to find the median when he stated:

> To some extent expression and action are always mingled: most conduct includes elements of both. Even the clearest manifestations of expression involve some action, as in the case of holding a meeting, publishing a newspaper, or merely talking. At the other extreme, a political assassination includes a substantial measure of expression.[176]

Courts should return to the compelling state interest test in cases involving symbolic speech. The expansion of the doctrine to include such expressions of feeling as assassinations need not be feared since they would hardly prevail over the obvious compelling state interests of peace, order, and life. Nonverbal conduct which falls within the areas of obsenity, hostile audiences, and subversiveness also need not be feared since they too would be surpassed by the established state interests.

Body language has always been present, yet only now has it come to be recognized as speech.[177] With the growth of new methods of expression the first amendment needs to be adapted. But these adaptations are being rated second class. Perhaps in time they too will receive full class status. Perhaps in time freedom of expression will be explained as merely a *casus omissus* of our Founding Fathers.

ELLEN S. PODGOR

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[170]Chief Justice Warren wrote the opinion for the majority in the *O'Brien* decision.

[171]See text accompanying notes 36-69 *supra.*

[172]See text accompanying notes 70-87 *supra.*

[173]See text accompanying notes 88-113 *supra.*

[174]See text accompanying notes 114-36 *supra.*

[175]See text accompanying notes 137-63 *supra.*

[176]T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80 (1970).

[177]J. FAST, BODY LANGUAGE (1970).

Recent Development

Security Regulation—SEC RULE 10B-5—Where allegations are made that the majority shareholders of a corporation have breached their fiduciary duty to deal fairly with the minority, through use of a Delaware short-form merger without any justifiable corporate purpose, a claim under rule 10b-5[1] exists. *Green v. Santa Fe Industries, Inc.*, 533 F.2d 1283 (2d Cir. 1976).

Even the most liberal commentators would not have guessed in 1934 that the Securities Exchange Act of that year[2] would evolve into an almost all-pervasive part of securities law. The scope of the 1934 Act was further broadened by the promulgation of rule 10b-5 by the Securities and Exchange Commission (SEC). Rule 10b-5 has created a duty upon corporate directors and majority shareholders to act fairly in matters concerning the sale or exchange of securities.[3] The recent case of *Green v. Santa Fe Industries, Inc.*[4] is yet another example of the rule being given an expansive reading in order to protect the interests of minority shareholders.

In *Green,* Santa Fe Industries, Inc. (Santa Fe) wholly owned Santa Fe Natural Resources (Resources), which in turn owned 95 percent of the capital stock of Kirby Lumber Co., a Delaware corporation.[5] During July of 1974, Resources considered a plan to effectuate a "short-form merger" pursuant to Delaware corporation law.[6] After deciding to proceed with the plan, Forest Products,

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[1]15 U.S.C. § 78j (1970); 17 C.F.R. 240.10b-5 (1972) [hereinafter cited as rule 10b-5].

[2]The Securities Exchange Act of 1934, 15 U.S.C. § 78 (1970).

[3]*See, e.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952), *cert. denied,* 343 U.S. 956 (1952). *But cf.* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973).

[4]533 F.2d 1283 (2d Cir. 1976), *petitions for cert. filed,* 44 U.S.L.W. 3730 (U.S. May 14, 1976), 44 U.S.L.W. 3743 (U.S. June 2, 1976).

[5]*Id.* at 1288.

[6]Delaware corporation law allows a parent corporation to merge the parent and a subsidiary where the parent owns at least 90 percent of the capital stock of the subsidiary and the approval of the parent's board of directors and shareholders is received. No prior notice is required and no statement of justifiable corporate purpose for the merger is needed. The only

Inc. (F.P.I.) was organized as a Delaware corporation.[7] Resources then agreed to transfer its 95 percent of the capital stock of Kirby to F.P.I. together with cash and assumption of certain liabilities. F.P.I., in turn, transferred all of its capital stock to Resources.[8]

Subsequently, the F.P.I. Board of Directors[9] passed a merger resolution which provided that F.P.I. would be merged into Kirby, with Kirby surviving as "new" Kirby.[10] The resolution stipulated[11] that the minority shareholders[12] of "old" Kirby could either receive $150 per share or the appraised value of their stock as was permitted by Delaware law.[13] On July 13, 1974, the merger became effective. After the merger, "new" Kirby sent to the 5 percent minority shareholders of "old" Kirby notification of the merger and an explanation of their rights, along with a detailed financial information statement regarding Kirby.[14]

The plaintiffs never tendered any of their stock of "old" Kirby and on August 21, 1974, they demanded appraisal of their stock. On September 9, 1974, the plaintiffs withdrew their demand and the next day, September 10, 1974, a lawsuit was commenced.[15]

The plaintiffs, in their complaint, sought the rescission of the merger and damages.[16] Their theory was that the short-form merger plan used by F.P.I. resulted in the minority stock of "old" Kirby

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remedy for the objecting minority shareholder is a demand for judicial appraisal. DEL. CODE ANN., Ch. 8, § 253 (Revised 1974). For a review of the Delaware law on both long- and short-form mergers, see 533 F.2d at 1289.

[7] *Id.* at 1288.

[8] *Id.*

[9] The members of the board of directors of F.P.I. were the same persons who comprised the board of directors of Resources. *See* 342 BNA SEC REG. & L. REP. A-1 (Mar. 3, 1976).

[10] 533 F.2d at 1288.

[11] Under Delaware corporation law, a merger resolution of this type may provide that, without any prior consent of the minority, all shares held by the minority shareholders will be purchased for cash. DEL. CODE ANN., Ch. 8, § 253 (revised 1974).

[12] The minority shareholders were the other five percent shareholders of "old" Kirby, of which the plaintiffs were members.

[13] 533 F.2d at 1288.

[14] Accompanying the statutorily required notice was:

> [A] statement (some 57 pages of the Appendix) which, in addition to setting forth extensive financial data, included: (1) the Morgan Stanley stock value based largely upon the price ranges for the Kirby stock freely traded on the market; (2) the Appraisal Associates' appraisal of physical assets of $320,000,000; and (3) an appraisal by Riggs and Associates of Kirby's oil, gas and mineral property interests.

533 F.2d at 1301.

[15] *Id.* at 1288.

[16] *Id.*

being acquired at a "grossly undervalued price."[17] The plaintiffs' lack of knowledge of the merger until after its completion, the lack of any business purpose for the merger and the purported undervaluation of the minority shareholders' stock constituted the basis for the plaintiff's allegations that the merger existed as a manipulative and deceptive device in breach of both rule 10b-5 and the common law fiduciary duty owed by the majority shareholders to "old" Kirby and its minority shareholders.[18] The District Court for the Southern District of New York dismissed the plaintiffs' complaint for failure to establish subject matter jurisdiction and failure to state a claim for which relief could be granted.[19] The plaintiffs appealed the order and judgment.

The majority opinion of the appellate court decided two crucial points of law before addressing the precise issues presented on appeal. First, compliance with all aspects of the Delaware law concerning short-form mergers was found to be no defense to a 10b-5 action.[20] The court noted that no state can preempt Congress' power to create substantive rights and remedies stemming from purchases or sales of securities in interstate commerce.[21] While a state may choose to create a particular right or remedy,[22] that will not preclude the federal courts, or Congress, from providing other forms of relief to redress violations of the Securities Exchange Act.[23]

The second point decided was that there does not have to be a showing of misrepresentation or lack of disclosure in order to state a claim under 10b-5.[24] Only subdivision (2) of 10b-5 deals with nondisclosure and misrepresentation. The court observed that subdivisions (1) and (3) of 10b-5 state explicit examples of other

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[17]Plaintiffs contended that due to the opinion of Appraisal Associates, which valued the land and timber of "old" Kirby at $320 million, their minority shares should have been at least $772 per share, as opposed to the $150 per share offered by "new" Kirby, in reliance on the opinion of Morgan Stanley & Co. *Id.* at 1288.

[18]*Id.*

[19]Green v. Santa Fe Industries, Inc., 391 F. Supp. 849 (S.D.N.Y. 1975).

[20]533 F.2d at 1286. The court noted that it previously ruled in Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972), that "where Rule 10b-5 properly extends it will be applied regardless of any cause of action that may exist under state law." *Id.* at 718. *See also* Vine v. Beneficial Finance Co., 374 F.2d 627 (2d. Cir.), *cert. denied*, 389 U.S. 970 (1967); Levine v. Biddle Sawyer Corp., 383 F. Supp. 618 (S.D.N.Y. 1974).

[21]533 F.2d at 1286.

[22]In the present case, the state remedy provided was the right of an objecting minority shareholder to demand judicial appraisal.

[23]533 F.2d at 1286.

[24]*Id.* at 1286.

forms of fraud which may also be actionable.[25] In an effort to remove "any lingering doubt on this point," the court established that it was an erroneous assumption to conclude that nondisclosure or misrepresentation are essential ingredients of a 10b-5 action.[26]

The court noted that the plaintiffs' claim, in essence, was that the short-form merger, when instituted for no justifiable corporate purpose, allows majority shareholders to fix the price that will be paid for the minority shares at a figure substantially lower than their actual value. When the shareholders turn in their stock and receive the amount stipulated by the majority, the corporation pays for the stock and the minority is "squeezed out." Consequently, the benefit from the transaction inures to the majority.[27]

The court found the main thrust of the district court's decision to be that no preliminary case under 10b-5 can be stated without some type of misrepresentation or lack of disclosure.[28] The district court was in error. While the "fraud" envisioned by 10b-5 included the classic examples of misrepresentation and nondisclosure,[29] the rule is not, according to the Second Circuit Court of Appeals, limited to those types of illegality. The court admitted that 10b-5 cannot be a "panacea for all corporate ills and management wrongdoing,"[30] but it also recognized a clear mandate to liberally construe 10b-5 so as to accomplish its intended purpose[31] to insure the integrity of the securities market.

The court relied for support of its position upon *Schoenbaum v. Firstbrook*,[32] a case in which the Second Circuit Court of Ap-

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[25]*Id.* at 1287. Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purpose or sale of any security.

17 C.F.R. 240.10b-5 (1951).

[26]533 F.2d at 1287.

[27]*Id.* at 1289.

[28]*Id.*

[29]*Id.* The court cited as "classic examples," Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Ruckle v. Roto Am. Corp., 339 F.2d 24 (2d Cir. 1964). *See also* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

[30]533 F.2d at 1290.

[31]*Id.* at 1287.

[32]405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906

peals held affirmatively that improper self-dealing and breach of fiduciary duty by a majority, without more, could constitute a 10b-5 violation. From *Schoenbaum*, the court reasoned that controlling shareholders should not be able to force the extinction of the minority interest where their sole purpose for such a tactic is monetary gain for the majority shareholders.[33] Such conduct, in the court's opinion, fell within the language of 10b-5 as "an act, practice, or course of business which operates or would operate as a fraud . . . ."[34]

In its finding that fraud can exist inherently in the "freezing out" of a minority interest for no justifiable corporate purpose, the court felt it was not without support from both scholarly works[35] and judicial opinions.[36] Specifically, the same court's recent decision in *Marshel v. AFW Fabric Corp.*[37] was seen as further affirmative support for its position. In *Marshel*, the court was faced with a long-form merger lacking any corporate purpose. Even though the long-form merger afforded the additional remedy of pre-merger injunctive relief, the court held that a 10b-5 violation could be stated, in the absence of misrepresentation or lack of disclosure, where the corporation expends corporate funds solely to eliminate the minority stockholders with no beneficial effect upon the corporation.[38] In light of the fact that the short-form merger has even less protections for the minority shareholder, the court considered it justifiable to read 10b-5 pervasively, thus affording a remedy for fraudulent conduct.[39]

The court, along with both the plaintiffs and defendant, relied upon *Popkin v. Bishop*,[40] another Second Circuit case, for additional support. In *Popkin*, there was no showing of misrepresentation or lack of disclosure resulting from the use of a New York long-form merger statute. The court ruled that no 10b-5 violation occurred

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(1969). *See also* Drachman v. Harvey, 453 F.2d 722, 737 (2d Cir. 1972) (en banc).

[33] 533 F.2d at 1290.

[34] *Id.*

[35] *See* Borden, *Going Private—Old Tort, New Tort, or No Tort?*, 49 N.Y.U.L. REV. 987 (1974); Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189 (1964); Note, *Going Private*, 84 YALE L.J. 903 (1975).

[36] *See, e.g.*, Bryan v. Brock & Blevins Co., 490 F.2d 563 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974); Voege v. American Sumatra Tobacco Corp., 241 F. Supp. 369, 375 (D. Del. 1965).

[37] 533 F.2d 1277 (2d Cir. 1976), *petition for cert. filed*, 44 U.S.L.W. 3751 (U.S. June 8, 1976).

[38] 533 F.2d at 1291.

[39] *Id.*

[40] 464 F.2d 714 (2d Cir. 1972).

and the complaint was dismissed.[41] The *Green* majority distinguished *Popkin* on the basis that in *Popkin* a justifiable corporate purpose for the merger existed—the avoidance of the possibility of future mismanagement.[42] Further, the court reasoned that *Popkin* impliedly supported its decision since the need for misrepresentation or lack of disclosure was linked to the long-form merger requirement of shareholder approval.[43] The court viewed the implication to be that where no shareholder approval is needed, as in the short-form merger, misrepresentation or lack of disclosure will not be required to establish a 10b-5 case.[44] Full disclosure was not the crucial inquiry. The court stated explicitly: "If there is no valid corporate purpose for the merger, then even the most brazen disclosure of that fact to the minority shareholders in no way mitigates the fraudulent conduct."[45]

Since the *Green* court was here dealing with a motion to dismiss, it was required to assume the truth of the allegations in the complaint.[46] Thus, the court held that where a complaint alleges that the majority shareholders have breached their fiduciary duty to deal fairly with the minority shareholders, by effecting a merger without any justifiable business purpose, a claim under 10b-5 has been stated.[47]

Judge Mansfield, in a concurring opinion, agreed with the majority that the short-form merger, as a way of "going private," inherently has enormous potential for abuse by corporate insiders.[48]

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[41] *Id.* at 716.

[42] 533 F.2d at 1291. *See* 464 F.2d at 716.

[43] 533 F.2d at 1291.

[44] The court noted that the *Popkin* decision stated:

> In many, if not most, corporate self-dealing transactions touching securities, state law does not demand prior shareholder approval. In those situations, it makes sense to concentrate on the impropriety of the conduct itself rather than on the 'failure to disclose' it because full and fair disclosure in a real sense will rarely occur.

533 F.2d at 1292, *quoting from* 464 F.2d at 719.

[45] *Id.* at 1292.

[46] *Id.* at 1287.

[47] *Id.* at 1291. The court did not hold that an allegation of excessively low valuation, alone, constitutes a 10b-5 claim.

[48] Judge Mansfield noted:

> Essentially, by 'going public' when the stock market is flourishing and squeezing out the public shareholders when the market is depressed, the majority is able to manipulate the sale and purchase of stock to its benefit and to the detriment of the public shareholders, depriving the latter involuntarily of their investment in the corporation, at a buy-out price unilaterally selected by the insiders, which they have every incentive to fix below the fair value of the public shareholders' investment.

Id. at 1295. *See also* Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297 (1974).

To allow such abuse to go unresolved undercuts the overriding purpose of 10b-5, which is to preserve the integrity of the securities market when potential abuse of market processes exists.[49] After a review of the Second Circuit's treatment of 10b-5 in earlier cases,[50] and an analysis of other circuits in accord with the court's position,[51] Judge Mansfield was careful to point out that where a legitimate corporate purpose exists no 10b-5 violation should result.[52] Two clear examples of such a legitimate purpose were offered. The first example is if a merger could enable a corporation to save on operating expenses. The second example is where the merger is used to dispose of an unprofitable business at a favorable price.[53] But, where a "dummy" corporation is organized only to "squeeze out" minority public shareholders, the burden should be upon the majority shareholders to show the existence of a legitimate corporate purpose.[54]

Judge Moore, in the dissenting opinion, asserted in very strong language that the majority had added a new clause to the Delaware merger statute by requiring a "justifiable corporate purpose." By so doing, it was implicit that the majority had created "an irrebuttable presumption that use of the short-form merger law amounts to a fraud *per se*."[55]

Judge Moore reasoned that the majority, by removing the requirement of misrepresentation or failure to disclose, had taken the element of fraud away from 10b-5.[56] The purpose of 10b-5, he argued, was to eliminate "fraudulent" practices. He felt the requirement of a showing of fraud must be maintained in order to give the rule its proper scope.

Judge Moore attempted to show, through a review of the leading case law,[57] that the provisions of 10b-5 have historically hinged upon a showing of fraud. Of the cases involving mergers, Judge Moore noted that in *Vine v. Beneficial Finance Co.*,[58] which

[49] 533 F.2d at 1296.

[50] *Id.*

[51] *Id.* at 1299.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 1301.

[57] *Id.* at 1302. Judge Moore cited Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971); SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1964); Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972); Drachman v. Harvey, 453 F.2d 722 (2d Cir. 1972); Shell v. Hensley, 430 F.2d 819 (5th Cir. 1970); Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir. 1967); O'Neill v. Maytag, 339 F.2d 764 (2d Cir. 1964); Levine v. Biddle Sawyer, 383 F. Supp. 618 (S.D.N.Y. 1974); Voege v. American Sumatra Tobacco Corp., 241 F. Supp. 369 (D. Del. 1965).

[58] 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967).

implicitly recognized the validity of short-form mergers, the court required that deception be shown. While the plaintiffs and the majority opinion relied strongly upon *Schoenbaum v. Firstbrook*,[59] the dissenter pointed out that in that decision, "[t]here was more than sufficient indicia of fraudulent non-disclosure to justify denial of a summary judgment motion."[60] Judge Moore concluded his review of the federal law by noting the recent decision of *Kaufmann v. Lawrence*,[61] where the District Court for the Southern District of New York held that a preliminary injunction to halt a long-form merger could not be issued without some showing of material omission or misrepresentation.[62] Upon the strength of all these decisions, Judge Moore felt warranted in his strong disapproval of the majority action which essentially nullified the short-form merger laws of 38 states.[63]

Judge Moore also disagreed with the majority ruling that no state law may interfere with the proper application of 10b-5. The states clearly have the power to regulate corporate mergers.[64] Corporations are creatures of the state and the majority's apparent intervention into state matters was seen as "the astonishing and impermissible establishment of a federal common law of corporations."[65]

As for the specific claims made by the plaintiffs, Judge Moore concluded that they centered around the lack of prior notice and the alleged undervaluation of the plaintiffs' stock.[66] With respect to the lack of notice allegation, Judge Moore was quick to point out that Delaware law made no provision for notice to the plaintiffs. Respecting the undervaluation, a sufficient remedy existed for the plaintiffs through the state judicial process of appraisal.[67]

Finally, Judge Moore took detailed objection to the majority's test of "justifiable corporate purpose" to determine whether a 10b-5 violation had occurred.[68] Numerous examples of types of corporate purposes that would have to be classified as violative

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[59]405 F.2d 215 (2d Cir. 1968).

[60]533 F.2d at 1302.

[61]386 F. Supp. 12 (S.D.N.Y. 1974).

[62]*Id.* at 17.

[63]533 F.2d at 1299.

[64]*Id.* at 1304.

[65]*Id.*

[66]*Id.* at 1306.

[67]In short, Judge Moore felt plaintiffs had "utterly failed to assert any cognizable breach of fiduciary duty; any injury entitling them to equitable relief; any fact whatsoever indicating impermissible overreaching or deception by the defendants." *Id.* at 1307.

[68]*Id.*

of the rule were given in the dissenting opinion.[69] Whatever the term "justifiable corporate purpose" may mean, Judge Moore perceived the standard as bearing "no reasonable relationship to the realities of short-form mergers."[70] In a cumulative sense, Judge Moore's position is that it is untenable to place a fiduciary duty upon the majority shareholders to show a "justifiable corporate purpose" behind their short-term merger. By so doing, the court was not providing a remedy to correct an alleged fraud. Rather, it was affording plaintiffs "an independent, substantive right totally unrelated to the anti-fraud scheme of the federal securities laws and in complete derogation of a valid state rule regulating corporate activity."[71]

While there is little doubt that the Delaware short-form merger law was a valid means of regulating corporate activity, Judge Moore's position that the federal court improperly intervened into this case seems indefensible. Clearly, the states are charged with responsibility for regulating the corporate entity. In theory, if a merger could be accomplished without the need for any securities transactions, the federal court would have no authority to take jurisdiction over a dispute which arose between the shareholders of the corporation. But, where the court is involved in a corporate activity which was effectuated through the use of the securities market, few would argue that the federal courts have no proper jurisdiction to hear alleged securities misconduct. Regardless of whether or not the plaintiffs alleged a 10b-5 violation, the majority acted correctly in stating, as a matter of law, that where a corporate merger complies with all the statutory requirements of a state, this fact will not prevent a dispute arising from alleged securities misconduct from being heard in federal court. To hold otherwise would be to approve of legislation by the states in derogation of the intent and purpose of 10b-5 and the entire body of federal securities law.

The case law examined by both the majority and dissenting opinions in some instances illustrates classic examples of the

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[69]Judge Moore noted:

> Freedom from worry about the impact of corporate decisions on stock prices; ability to take greater business risks than those sanctioned by federal securities agencies; a switch to more conservative accounting, resulting in lower taxes; the savings which result from no longer having to prepare, print and issue the myriad of documents required under federal and state disclosure laws; the removal of a pressure to pay dividends at the expense of long-term capital development or speculative capital investment . . . .

Id. at 1308.

[70]*Id.*

[71]*Id.* at 1307.

writer's reading favorable interpretations into the decisions. For example, the *Green* majority read the *Schoenbaum v. Firstbrook*[72] decision as supportive of the position that the controlling shareholders should not be able to push out the minority interests for monetary purposes alone.[73] The dissenter took the position that *Schoenbaum* represented yet another example of the requirement that some form of fraudulent nondisclosure must be present for a 10b-5 violation to exist.[74] Despite the opinion expressed by the dissenter, a more accurate reading of *Schoenbaum* is that those alleging 10b-5 violations have the right to discovery before a summary judgment motion can be lodged against them. The *Schoenbaum* opinion holds that a 10b-5 violation is cognizable where one corporation exercises controlling influence over the issuance of the stock of another corporation, at a wholly inadequate consideration.[75] The opinion impliedly supports the dissenter's position that lack of misrepresentation or nondisclosure will bar a 10b-5 violation, but only because the court failed to address that specific issue.

Essentially, in *Green*, two key differences exist between the positions of the majority and the dissent. The first is whether 10b-5 requires a material omission or nondisclosure. The second concerns the promulgation of "justifiable corporate purpose" as the test for whether or not a 10b-5 violation has occurred.

The majority relied upon the fact that only subdivision (2) of 10b-5 specifically requires material omission and nondisclosure. The dissent asserted that 10b-5 requires a showing of fraud, and none can exist without the showing of a material omission or nondisclosure. While 10b-5 clearly encompasses fraudulent conduct, the better rule would put the emphasis upon the qualitative nature of the conduct in defining fraud, rather than strictly adhering to the classic elements of common law fraud. This rule does not advocate a new definition for fraud, generally, but only the understanding that fraud, for 10b-5 purposes, may exist where only subdivisions (1) or (3) are alleged.

When the requirements of 10b-5 are applied to the corporate merger, care must be taken to determine whether the long- or short-form merger is being discussed. The *Green* majority was correct when it reviewed *Popkin v. Bishop*[76] and reasoned that simply because a long-form merger may not create a 10b-5 violation it does not follow that the same conclusion will obtain where a short-form merger is utilized. The Second Circuit's recent deci-

[72]405 F.2d 215 (2d Cir. 1968).

[73]*See* p. 6 *supra.*

[74]*See* p. 11 *supra.*

[75]405 F.2d at 218-19.

[76]464 F.2d 714 (2d Cir. 1972).

sion in *Marshel v. AFW Fabric Corp.*[77] further established that the two forms of merger are clearly distinguishable when the potential for securities fraud is considered. With the long-form method, approval by the shareholders of a corporation to be merged is required. Even if the minority cannot stop the majority vote, the notice imparted by that event provides the minority with the opportunity to enjoin improper activity before the merger reaches conclusion. The *Marshel* case held that even with the long-form merger, a showing of nondisclosure may not be essential to 10b-5 liability. This can only be seen as affirming the majority's interpretation of *Popkin*, that the short-form method requires even closer scrutiny because of the larger potential for abuse stemming from the total lack of knowledge of the underlying circumstances on the part of the minority shareholders. The majority correctly held in *Marshel* that the important area of focus is not whether the majority shareholders told the minority what they were going to do to them[78]—made a full disclosure—but whether or not the merger itself represented a fraudulent device as contemplated by 10b-5.

The area deserving of attention is the purpose behind the short-form merger. The majority uses "justifiable corporate purpose" as the test for whether the merger technique is being used as a fraudulent device.[79] In essence, a finding of no justifiable corporate purpose results when the merger process is used solely to gain a monetary reward, or to "go private" solely because the economy makes it more desirable for a corporation to be closely held. In such situations, the merger itself represents a fraudulent device. As the concurring opinion points out, the underlying rationale for 10b-5 was to promote integrity in the securities market.[80] By requiring that a justifiable corporate purpose exist, the

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[77]533 F.2d 1277 (2d Cir. 1976).

[78]In the *Marshel* case, the majority shareholders blatantly informed the minority that it was closing them out with huge profit to the majority interest. 533 F.2d at 1280.

[79]However, the majority does not postulate what a "justifiable corporate purpose" will be. The concurring opinion supplies two examples which would meet his requirements. *See* p. 9 *supra*. The dissenter lists numerous examples, although he feels the majority decision makes them all violative of the test. *See* note 69 *supra*. At least one commentator has offered as the proper definition "a compelling corporate need to revert to a privately held status in order to function as a viable business entity." Note, *Going Private*, 84 YALE L.J. 903 (1975).

[80]Earlier, the majority opinion also noted:

> Since the time to which the memory of man runeth [*sic*] not to the contrary the human animal has been full of cunning and guile. Many of the schemes and artifices have been so sophisticated as almost to defy belief. But the run of those willing and able to take unfair advantage of others are mere apprentices in the art when com-

court is insuring that a merger involving a securities transaction cannot be used to force a sale by the minority interest solely for the monetary benefit of the majority. Whether the minority knows beforehand that such a possibility exists is not the issue. The policy behind 10b-5 is that the use of securities for such a purpose is improper.

One problem area remains: Does a 10b-5 action provide the proper forum to attack a short-form merger? Even assuming that the majority's reading of 10b-5 is an expansion of the term "fraud" to its outer borders, it does not follow that such a reading is incorrect.

The issue is one of form over substance. Is it more important that the rigid concept of fraud be maintained, or that the ends of justice be met? New rules should be passed to better reflect the purpose of the Securities Act of 1934—to "clean up" the securities market. The SEC currently is considering proposed rules which would require that a corporation have a valid corporate purpose for the use of the short-form merger.[61] This requirement would allow 10b-5 once again to regain its more conventional shape. However, until its passage, if abuses occur, it is better to have improper activities corrected by a broad interpretation of 10b-5 than to permit a strict construction of 10b-5 to serve as the vehicle for potential injustice.

BRIAN SCHUSTER

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pared with the manipulations thought up by those connected in one way or another with transactions in securities.

533 F.2d at 1287.

[61] Proposed SEC Rules 13e-3A and 13e-3B, 2 CCH FED. SEC. L. REP. ¶¶ 23,704-05; Sec. Act. Release No. 5567. *See also* [Current] CCH FED. SEC. L. REP. ¶ 80,104 (1974-75).

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